SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM A. D. 1874.

No. 278.

THE COLORADO.

Appeal from the Circuit Court for the Eastern District of Michigan.

In Admiralty.

BRIEF FOR LIBELLANT AND APPELLEE.

NEWBERRY, POND & BROWN,
Libellants' Proctors.

HENRY B. BROWN,
JOHN S. NEWBERRY,
Advocates.

DETROIT.
O. S. GULLEY'S STEAM PRESSES, 10 & 12 LARNED STREET, EAST.
1875.

SUPREME COURT

OF THE

UNITED STATES.

IN ADMIRALTY.

OCTOBER TERM A. D. 1874.

ELON W. HUDSON,
Appellee.

vs.

THE PROPELLER COLORADO,
CHARLES ENSIGN,
GEORGE W. HOLT,
Claimants and Appellants.

Appeal from the Circuit Court for the Eastern District of Michigan.

BRIEF FOR LIBELLANT AND APPELLEE.

This is a libel *in rem* for a collision between the barque H. P. Bridge and the propeller Colorado, which took place on the 11th day of May, A. D. 1869, off Saginaw Bay, in Lake Huron. The cause was first tried in the District Court on the 26th of April, A. D. 1871, and a decree rendered for the value of libellant's vessel, her freight and part of her cargo. This decree was subsequently affirmed by the Circuit Court. The following facts we believe to be undisputed:

(1.) That the collision occurred between 11 and 12 o'clock of the night of May 11th, A. D. 1869, from 25 to 40 miles southerly and easterly of Thunder Bay light, and about the same distance from Pointe Aux Barques light; or as some of the witnesses say, about "half way across Saginaw Bay," meaning half way between the two lights. (Fols. 42, 126, 219, 262, 258, 300, 327, 371.)

(2.) During the evening and prior to 10 o'clock the weather was varying, with showers of rain, thick and foggy at times, though not densely or constantly so. (Fols. 43, 70, 84, 93, 103, 139, 95, 96, 210, 262, 301, 355.)

(3.) From 10 o'clock until the collision there was a dense fog. (Fols. 71, 127, 242, 369.)

From 9 o'clock until the collision the wind was south, blowing a 5 or 6 knot breeze. (Fols. 43, 44, 137, 237, 262, 301.)

THE BARQUE H. P. BRIDGE.

(1.) From 9 o'clock until the collision the barque was sailing close hauled on the starboard tack, on a course about S. E. by E. (Fols. 44, 47, 127, 137, 166, 184, 237, 262.)

(2.) As soon as the fog set in she commenced shortening sail and had got all her light sails taken in about 30 minutes before the collision. (Fols. 45, 137, 161, 192, 274.)

(3.) During the continuance of the fog two blasts of the horn were sounded from the barque at intervals of one minute. (Fols. 46, 47, 48, 68, 85, 104, 140, 186, 190, 220, 239, 263, 264, 273.)

(4.) She was proceeding at a speed of about 3 miles an hour. (Fols. 45, 139, 237, 258, 262, 274, 286.)

(5.) She made the light of the Colorado from one to four points on her weather bow. (Fols. 46, 50, 74, 140, 142, 169, 170, 187, 220, 244, 264, 268.)

(6.) The propeller shortly afterwards struck her at an angle of about 45 degrees and she sank in about an hour. (Fols. 319, 343.)

PROPELLER COLORADO.

(1.) Before the fog set in the Colorado, a large propeller of 1,500 tons, was proceeding up the lake at a speed of 9 or 9½ miles an hour.

John B. Hall.

Folio 301.—"Just before the fog commenced her speed had been between 9 and 10 miles an hour—our usual speed."

CROSS-EXAMINED.

Folio 332.—"Her usual speed is not more than 9 or 10 miles an hour. She would scarcely average nine this season."

Adam Haig.

Folio 355.—"The speed of the vessel before the fog commenced, had been about 9½ miles an hour. That is her usual speed when on her regular trips."

James N. Armstrong.

Folio 370.—"Our vessel, before the fog shut in, was going about 9 knots an hour. When the fog shut in we checked our vessel down."

(2.) After the fog shut in, her deck was left in sole charge of John B. Hall, mate, Benjamin Walsh, wheelsman, and James N. Armstrong, look-out.

John B. Hall.

Folio 329.—"After calling the captain I went back and told the engineer and back to my station in front of the pilot house on the hurricane deck, and commenced blowing the whistle; I went to the skylight over the engine room to tell the engineer; the skylight is nigher aft than forward; it is just abaft tbe smoke-stack on the promenade deck; I walked from the pilot house to the sky light, and then back; I came back as quick as I could; while I was gone there was no one on watch except the look-out; I was obliged to leave as I did; there was no one else there but the look-out."

George Stedman.

Folio 158.—"I heard him, the wheelsman say, he did not know how he was steering at the time; I heard him say there were only three men on deck at the time of the collision; that is, that were where they could see. I asked him who they were, and he said it was the mate, the look-out and himself."

(3.) The course of the propeller was N. N. W. (Fols. 317, 301, 304.)

(4.) After the fog shut in, her speed was slackened to five or six knots an hour. (Fols. 304, 384.)

We claim the propeller was in fault in the following particulars:

1. In that she had no proper look-out.
2. In that she should have had a second wheelsman at the wheel.
3. In that the officer of the deck was not stationed where he had instant access to the engine bells.
4. In that her speed was excessive, and she did not take the proper precaution by stopping and backing to avoid the collision.

I.

SHE HAD BUT A SINGLE LOOK-OUT, AND HE IS SHOWN BY HIS OWN TESTIMONY AND THAT OF THE OFFICERS AND CREW TO HAVE BEEN GROSSLY INCOMPETENT.

(1.) *As matter of law a steamer of* 1,500 *tons burthen has no right to pursue a frequented track in a dense fog with only a single look-out.* It will be borne in mind that the propeller was one of the largest class of lake vessels; that she was travelling a narrow road or lane which all the craft plying between the straits of Mackinaw and the St. Clair river, are forced to take. All of the immense commerce between the several ports on Lake Michigan and those on Lakes Erie and Ontario, are accustomed to shape their course close along the western shore of Lake Huron, from Port Huron to Pointe Aux Barques light, thence steering direct for Thunder Bay light along the path pursued by these vessels. Under these circumstances the necessity for careful navigation in a foggy night, can scarcely be exaggerated.

We impute it as a fault which led directly to this collision, that this propeller took no extra precautions on account of the character of the night, and was pursuing her voyage with no greater watchfulness or number of men than the law would have compelled her to carry upon a clear day.

On such a night a single lookout, however experienced a seaman he might have been, and however watchful of his duty, was clearly insufficient.

The "Europa," 2 E. L. & E., 557.

This was a libel for a collision between the barque Charles Bartlett and the steamer Europa, which occurred 700 miles west of Cape Clear, in the track of outward and homeward bound vessels passing to and from America. There was a dense fog, and the defence of inevitable accident was set up. The speed and density of the fog was admitted, but as to the chance of meeting vessels in this particular locality, the facts were at variance, and the evidence contradictory. Much discussion was had by the Court upon the evidence as to whether the collision took place in the ordinary trans-atlantic highway which is not applicable in this case as there can be no question that the track was a frequented one. It appeared that in fogs and in cases of difficulty the Europa was accustomed to carry six look-outs, besides a man at the lee side of the bridge and a man at the crank conveying orders to the engine room. The watch on this night however consisted of an officer on the bridge, his junior at the con, the quarter-master at the wheel, two look-outs on the top gallant forecastle, and a second hand at the wheel in dense fogs, and the court condemned her for want of a proper look-out. "I have no hesitation in saying that under the circumstances the case requires as a reasonable look-out, the most ample that could be adopted."

The "Mellona," 3 W. Rob. 7.

The ship Mellona was making her way through the Cockle Gat on a dark, hazy night with frequent snow squalls. The look out consisted of the master and one seaman. The master had gone below to look at his chart when another vessel which had not been observed in the darkness, ran into the Mellona. She was condemned for want of a proper look-out, the court holding that in proportion to the greatness of the necessity the greater ought to be the care and vigilance employed.

The "Wirrall," 3 W. Rob. 56.

It was held in this case that the location of the look-out should depend upon the circumstances of the navigation; that in the case of paddle wheel steamers plying in the river Mersey, the proper place for a look-out is the bridge between the paddle boxes, from which he can obtain a clearer view of approaching vessels.

The "Germania," 3 Mar. Law Cases, 269.

Collision between a barque and the steamship Germania, in the English channel in a clear night.

In delivering the judgment of the Privy Counsel, Lord Romilly said: "The look-out on board the Germania consisted of these, viz: one on the look-out at the bowsprit, another one on the look-out on the bridge—the chief officer and also the pilot, but who had not charge of the vessel, were also on the bridge. Their Lordships are informed by the Naval Assessors who assisted them, that it is the usual practice in the king's ships to have never less than two look-outs at the bowsprit, and their Lordships are not satisfied with the sufficiency of the reason alleged for having only one of these look-outs in the present case. The Germania was not a government vessel but belonged to the Hamburg Line.

Chamberlain vs. Ward, 21 How., 548.

This was the celebrated collision case between the propeller Ogdensburg and the steamer Atlantic. The disaster occurred upon Lake Erie, upon a clear night. Mr. Justice Clifford in delivering the opinion observes, page 571: "Ocean steamers usually have two look-outs in addition to the officer of the deck, and in general they are stationed one on the larboard and the other on the starboard side of the vessel, and as far forward as possible, and during the time they are so engaged, they have no other duties to perform, and no reason is perceived why any less precaution should be taken in first class steamers on the lakes. Their speed is quite as great, and navigation is no less exposed to dangers arising from the prevalence of mist and fog, or from the ordinary dangers of the night; and the owners of vessels navigating on these waters are under the same obligations to provide for the safety of life

and property as attaches to those who are engaged in navigating the seas."

The "Ariadne," 13 Wallace, 475.

Collision between the steamer Ariadne and the barque William Edwards. The collision occurred during a clear night but it appeared from the testimony that the barque had no lights, or none that could be seen. It also appeared that the steamer was moving; that she was about 200 feet long; that she obeyed her helm with unusual quickness, and could be easily stopped in a space of twice her lengt . he approached the barque in a direction favorable for the look out to see the hull and sails of the latter. She had but one look-out. The second mate saw the barque first. He asked the look-out if he saw her. The look-out thereupon turned and saw her, The court condemned in very strong language the want of a look-out upon the steamer, and reversed the concurring judgments of both the lower courts, upon the ground that although the barque was in fault for not having the proper lights, the steamer was also in fault for want of a proper look-out.

The Circuit Court in this case found that the propeller should have had two additional look-outs upon the cross-trees; and we submit that upon this point the judge was clearly correct. Under the circumstances as they appeared that night, with horns constantly sounding about the propeller, it was incumbent upon her not only to have an additional seaman upon the deck, but to have placed at least one man aloft who could observe the sails of vessels whenever the fog sunk down upon the water and left the upper air clear. It is no excuse to say that in the judgment of the master a look out could see no better aloft than below. He could not know that fact with any certainty until he had sent a man there to see. As a matter of fact two witnesses upon the barque who did go aloft say the fog was lighter there than on deck.

Isaac Stedman.

Folio 49.—In reply to the question, "Who made her mast headlight first?" says: "I did from underneath our mizzen cross trees." *Q.* What were you upon the mizzen cross-trees for? *A.* To see if I could get the position of the propeller any better up there than I

could on deck; it might have been perhaps three minutes before the collision that I saw her mast head light from the mizzen rigging; at that time I saw no other light; I could not tell how far she was off; I saw it as soon as I got aloft; just as I got on the cross-trees she blew her whistle and gave me her location so that I knew where to look for her.

George Stedman.

Folio 138.—I assisted in furling the sails; I suppose I was aloft that evening over ten minutes. *Q.* Did you notice whether the fog was denser or lighter than it was below? *A.* It was lighter at the time I was aloft. *Q.* Could you see lights when you were aloft? *A.* Yes, sir; I saw two or three; one red light and one which I could not tell whether it was a bright or a green light; they seemed to be about four miles; between three and four miles.

It is argued by claimant's advocate that the watch upon propeller deck should be considered sufficient, and that the propeller could not be held in fault unless it appeared that she violated some law, regulation, rule or custom. We think he is in error here. Article 20 of the collision act provides that nothing can exonerate any ship from the consequences of any neglect to carry lights, or for any neglect to keep proper look-outs or for the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. Under this article it may be said that the law requires a proper look-out to be kept, but it does not define what shall be a proper look-out. The practice of carrying look outs upon the lakes was not the result of any law requiring it, or of any custom, but was the sole consequence of the decision of the admiralty courts, notably in the case of the Atlantic that good seamanship required a look-out. Before the act of 1864 was passed, there was no statute requiring a look-out and ship masters upon the lakes fought against it until the decisions of the courts compelled them to carry one. Had a propeller before the passage of the act been libelled for carrying no look out, the owner might have pleaded the very defense set up here, that there was no law or custom requiring one to be carried. But it will not for one moment be pretended that the court could have exonerated them on that account—in other words, they violated no law or custom.

There is nothing now defining what shall be a proper look-out. Suppose the vessel masters on the lakes should combine to carry no person especially detailed as a look-out, and should insist that the officer of the deck was the proper look-out within the meaning of the article, what possibility that the courts would so consider it?

The question is, not what does *law or custom* require, but what does *good seamanship* require. It is after all necessary for the court to determine what is a proper look-out, and that can only be ascertained by considering the special circumstances of each case. It seems almost absurd to argue that greater precaution is necessary on a dark, foggy night than upon a clear night, and yet the defense in this case rests upon a denial of this proposition.

2. *The seaman who acted as look-out was incompetent for that purpose.*

He seems to have been a sailor of some experience, but had been mostly upon the ocean, in the China and European trade. He had been upon the Colorado but eleven days, and this was his first trip upon the lakes. (Fols. 368-9.)

He did not understand the significance of the horns he heard, that is, whether they indicated that the vessel was on the starboard tack or port tack, or whether she was running free or close hauled. (Fol. 385.) He admits himself that he did not understand the horns, and both Nolan and Erskine swore that he admitted to them that he knew nothing about them.

Neil McCollum.

Folio 109.—*Q.* What was the conversation?

A. They asked him if he did not hear our horns, and he answered that he did. They then asked him why he did not mind the signals and the horns. He replied he did not know what they meant.

George Stedman.

Folio 150.—Says: "I asked him whether he heard our bell or horn. I asked him if he could tell how many blasts of the horn was blown. He told me that he did not know anything about it. I asked him if the mate had given him any instructions, and he said no. I asked him then if he did not see our light. He said it was his first

trip on the lakes, and that he did not know one light from another. He said he heard two blasts of a horn, but did not know what it meant.

3. *After the Bridge's horn had been heard on the propeller, and before her light was discovered, the look-out was called from his post and sent into the wheelhouse; thus at the most critical moment, when the services of a look-out became most imperatively necessary, he was called off and set to other work.*

James M. Armstrong, look-out.

Folio 371.—I remained forward as I have stated until I was called to assist the man at the wheel. Folio 373.—The mate asked me if I understood there were two blasts. I told him I did. Next I was called into the wheel house by the mate to assist the man at the wheel; I can not recollect what the words he used were, but the expression was for me to go into the wheel-house as quickly as possible.

John B. Hall, mate.

Folio 304.—Armstrong remained on the look-out until I called him to the wheel.

Folio 308.—*Q.* Where was the look-out when you ordered him to go into the wheel house?

A. He was at his station on the promenade deck.

Q. Did the look-out go into the wheel house?

A. Yes, sir.

The fact that he was needed in the wheel house is no excuse for this. It was no sudden emergency. They had been running through the fog for more than an hour, and the necessity for an extra wheelsman was well known to the master and mate.

The Schooner "Catherine," 17 How., 170.

In this case it was held no excuse for want of a proper look-out in the night in a place much frequented by vessels that all hands were employed in reefing, there being no unusual emergency. The Court say: "We are not satisfied she had a proper look-out on the vessel at the time of the collision. The excuse given is that all hands a short time previously had been called to reef the sails, and some evidence is given to prove that this is customary on vessels of this description. However this may be in the day time, we think that such a custom can not be permitted as an excuse for dispensing with the proper look-out in a fog, or in the night, especially on waters frequented by other vessels."

The mate is in reality less in fault for this than the master whose attention had been called to the fact the boat was short handed, and yet refused to come on deck.

John B. Hall.

Folio 302.—I have seen it as foggy other seasons, but never more so. It was not rainy. Before it altogether shut in, I called the captain who was in his room. He did not come on deck but told me to tell the engineer to let her go slow, to blow the whistle, and to call him when the watch was out.

Folio 335.—I called the captain when the fog shut in because I was so ordered, and it is customary, and I would do it without orders.

Thorp vs. Hammond, 12 Wall., 408.

Substantially the same doctrine is here laid down. The syllabus is as follows: When a vessel is sailing in close proximity to other vessels, the fact that her hands are engaged in reefing, is no excuse for failing to keep a proper look-out, or to take such precautions as are needful to avoid collisions. The respondents insist that it is a custom of the sea not to have a look-out in the day time or while reefing, and they have produced witnesses to prove such a custom, butt he evidence falls far short of showing that such a custom exists generally, and if it were proved it would not be a reasonable one.

4. *The lookout in fact did not hear our horn until the vessels were very near together.*

Estimating the time which elapsed between the first hearing of our horn on the Colorado and the collision, not by the guesses of the mate, but by what was actually done, we find it did not exceed fifteen to twenty seconds. The lookout first heard and reported a single blast. (Fol. 372.)

He was then standing forward by the stem on the promenade deck. The mate was standing on the hurricane deck in front of the pilot house.

John B. Hall.

Folio 302.—"I commenced blowing the whistle, and took my station in front of the pilot-house." "I sounded the whistle up to within a minute or two of the collision." "Armstrong was stationed on the promenade deck, as far forward as he could conveniently get—probably six or eight feet from the stem." Folio 305.—"I heard a horn, which afterwards turned out to be on the Bridge. First heard one blast of the Bridge's horn. It appeared to be directly ahead. I was

trip on the lakes, and that he did not know one light from another. He said he heard two blasts of a horn, but did not know what it meant.

3. *After the Bridge's horn had been heard on the propeller, and before her light was discovered, the look-out was called from his post and sent into the wheelhouse; thus at the most critical moment, when the services of a look-out became most imperatively necessary, he was called off and set to other work.*

James M. Armstrong, look-out.

Folio 371.—I remained forward as I have stated until I was called to assist the man at the wheel. Folio 373.—The mate asked me if I understood there were two blasts. I told him I did. Next I was called into the wheel house by the mate to assist the man at the wheel; I can not recollect what the words he used were, but the expression was for me to go into the wheel-house as quickly as possible.

John B. Hall, mate.

Folio 304.—Armstrong remained on the look-out until I called him to the wheel.

Folio 308.—*Q.* Where was the look-out when you ordered him to go into the wheel house?

A. He was at his station on the promenade deck.

Q. Did the look-out go into the wheel house?

A. Yes, sir.

The fact that he was needed in the wheel house is no excuse for this. It was no sudden emergency. They had been running through the fog for more than an hour, and the necessity for an extra wheelsman was well known to the master and mate.

The Schooner "Catherine," 17 How., 170.

In this case it was held no excuse for want of a proper look-out in the night in a place much frequented by vessels that all hands were employed in reefing, there being no unusual emergency. The Court say: "We are not satisfied she had a proper look-out on the vessel at the time of the collision. The excuse given is that all hands a short time previously had been called to reef the sails, and some evidence is given to prove that this is customary on vessels of this description. However this may be in the day time, we think that such a custom can not be permitted as an excuse for dispensing with the proper look-out in a fog, or in the night, especially on waters frequented by other vessels."

The mate is in reality less in fault for this than the master whose attention had been called to the fact the boat was short handed, and yet refused to come on deck.

John B. Hall.

Folio 302.—I have seen it as foggy other seasons, but never more so. It was not rainy. Before it altogether shut in, I called the captain who was in his room. He did not come on deck but told me to tell the engineer to let her go slow, to blow the whistle, and to call him when the watch was out.

Folio 335.—I called the captain when the fog shut in because I was so ordered, and it is customary, and I would do it without orders.

Thorp vs. Hammond, 12 Wall., 408.

Substantially the same doctrine is here laid down. The syllabus is as follows: When a vessel is sailing in close proximity to other vessels, the fact that her hands are engaged in reefing, is no excuse for failing to keep a proper look-out, or to take such precautions as are needful to avoid collisions. The respondents insist that it is a custom of the sea not to have a look-out in the day time or while reefing, and they have produced witnesses to prove such a custom, butt he evidence falls far short of showing that such a custom exists generally, and if it were proved it would not be a reasonable one.

4. *The lookout in fact did not hear our horn until the vessels were very near together.*

Estimating the time which elapsed between the first hearing of our horn on the Colorado and the collision, not by the guesses of the mate, but by what was actually done, we find it did not exceed fifteen to twenty seconds. The lookout first heard and reported a single blast. (Fol. 372.)

He was then standing forward by the stem on the promenade deck. The mate was standing on the hurricane deck in front of the pilot house.

John B. Hall.

Folio 302.—"I commenced blowing the whistle, and took my station in front of the pilot-house." "I sounded the whistle up to within a minute or two of the collision." "Armstrong was stationed on the promenade deck, as far forward as he could conveniently get—probably six or eight feet from the stem." Folio 305.—"I heard a horn, which afterwards turned out to be on the Bridge. First heard one blast of the Bridge's horn. It appeared to be directly ahead. I was

then standing in front of the pilot-house. I think the lookout and I both heard it at the same time."

James N. Armstrong.

Folio 370.—I was forward on the promenade deck; as far forward as I could get. The mate was with me until the fog shut in, and then went on the hurricane deck, forward of the wheel-house. Folio 372. I was standing forward on the lookout when I heard the first blast on the Bridge; it seemed to be right ahead. When I heard the first blast of the Bridge's horn he was on the hurricane deck forward of the pilot-house. I asked the mate if he heard it, and he allowed he heard it, and said it sounded to him the same that it did to me, right ahead.

The mate then ran to the top of the pilot house, immediately upon hearing the horn, ordering the wheel to port, as he started.

Folio 306.—He said: Did you hear that horn? I said yes, and started for the pilot-house. I went on top of the pilot-house and stopped both engines, and gave an order to the man at the wheel to port. That order was given just as I started to go to the top of the pilot-house. I gave the order to port immediately upon hearing the horns. I went to the top of the pilot-house as quick as I could get up there. The engine-bells on the Colorado are worked from the top of the pilot-house. The next thing I heard was two blasts of the Bridge's horn.

Folio 337.—When I gave my wheelsman the first order to port, I was standing in front of the pilot-house. I gave it just as I started for the top of the pilot-house. He must have got the wheel half a turn over before I got to the top of the pilot-house. I went hastily; probably did not take more than five seconds.

Going to the top of the pilot-house occupied but five seconds, and the wheelsman had got the wheel but half a turn over before he got there.

He, the wheelsman, had got the wheel but one turn to port when he received the order to starboard. This was from three to five seconds after the mate reached the top of the pilot-house.

John B. Hall,

Mate, says, folio 338:—I think the wheelsman had got the wheel about half a turn to port when I got on top of the pilot-house; and I think he had got it about one turn to port before I gave him the order to starboard. I could not tell how long it took me to go from

my station to the top of the pilot-house. I do not think it would take five seconds. The wheel was about half a turn to port when I got to the top of the pilot-house, and that was from three to five seconds after he got the order to port, and then in from three to five seconds longer he would have had it over one full turn to port, and at that point I gave him the order to hard-a-starboard.

Folio 308 he says: *Q.* About how far should you think did the wheelsman have time to get the wheel on the port side before you gave the order?

A. Probably about a turn; I do not think more.

Q. About how long, then, was it between the two orders, to port and starboard?

A. It might have been half a minute.

The lookout says, folio 374: "When I got into the wheelhouse, the man at the wheel was rolling it over to starboard. When I got into the wheelhouse, I went to the port side of the wheel and helped the man to put it to starboard. The wheel was hard to starboard when the collision occurred. We had just got it hard-a-starboard when the collision took place."

Allowing ten seconds to get it over to starboard, reduces the whole time to twenty seconds.

The order of events on the propeller seems to have been this: The mate was standing in front of the pilot house, and lookout forward at the stem. The nearest communication with the engine being on the top of the pilot-house. (Fol. 303 and 304.) They heard other horns than those they finally heard on the Bridge for some five or ten minutes before they heard the one on the Bridge. (Fol. 305.) Heard one on the starboard hand, about a beam, and I think two on the port hand, about a beam. They then heard one blast of the Bridge's horn, apparently directly ahead. (Fol. 305.) The mate then started for the top of the pilot house, and on the way ordered the wheelsman to port, and on reaching the top of the pilot-house stopped the engines. Just then he hears two blasts of the horn, calls the lookout from his post to the wheel, and orders the engineer to back the port engine, and the wheelsman to put the wheel hard-a-starboard. When the lookout reaches the pilot-house, the wheelsman was rolling the wheel over to starboard, and just as it is gotten over the col-

lision occurs. Simultaneously with giving the order to star board, the mate rings the bell to back the starboard engine.

But from the admissions of the engineer, it is apparent that only one engine was backing at the time of the collision.

Patrick W. Nolan,

Says, folio 233:—"After that the engineer came in and renewed the subject; said she was under a slow check; that he was working only one engine at the time of the collision. The next morning I got to talking with the engineer about the collision. He allowed the mate did what was very proper. I asked him, how? He said, by backing on one wheel and going ahead with the other. I told him that was neither prudent nor proper; that the Government rules called for stopping and backing; and moreover he allowed last night she was working only one engine. I asked him what engine he backed on; he said on the starboard engine, and went ahead on the port engine

Now the inference from all this is inevitable, either:

1. That the lookout did not hear our horn as soon as he should have heard it, for the evidence is undisputed that it had been sounding for at least an hour. This view is also supported by the fact that he heard but one blast when we were blowing two, and failed entirely to hear our bell and hail. (Fol. 386.) This was a fault.

The "Vianna," Swab., 405. In this case the lookout was held in fault for not noticing an intended launch.

The "Adalaide," Taney, 575 and 580. Vessel was condemned for not seeing lights displayed by another vessel at anchor. The court says: "It is not sufficient that a person should be stationed as a lookout, and be called a lookout. He must perform that duty and perform it diligently, and it is impossible to believe that a vessel like the brig, with a signal-light up, could not have been seen by a diligent lookout on board the "Adelaide" long before she approached within fifty yards." "It was his duty to keep a vigilant lookout to leeward as well as to windward and ahead; if he had done so he could not have failed to see the light at a much greater distance."

Wright vs. The Norwich Transpertation Company, 8 Blatch., 14.

Held, When a lookout, whose duty it is to report a vessel which he sees, does not report her when he sees her, that fact leads to the

belief that he was not performing his duty as the lookout in any respect. "The schooner had her proper lights. It is not possible that a lookout on the "City of Norwich" was in the actual exercise of diligence or he would have sooner discovered her. Indeed, when he did see her, he did not report her. This neglect of duty he seeks excuse by his belief that the pilot had then discovered her. It was his duty to report, and not trust to his supposition or surmise."

The John Fraser, 21 How., 184 & 192.

Held, That all colored persons, who under the laws of the State could not be examined as witnesses, were incompetent as lookouts. "The law requires of the colliding vessel that she shall prove not only that she had a competent lookout stationed at the proper place, but also that the lookout was vigilantly performing his duty, and if he placed there persons who cannot be witnesses, it is his own fault."

The Freestone., 2 Bond, 234.

Held, That it was no excuse for the neglect of a lookout in failing to be in in his proper place, that the upper deck was crowded with soldiers, and that there may have been difficulty in passing from one part of the boat to the other.

2. But if it be true that the lookout did hear the horn for some time before the collision, then the mate was in fault for not giving the order to stop and back until just as it had become inevitable.

II.

IN A NIGHT OF SUCH A CHARACTER THE PROPELLER SHOULD HAVE HAD AN EXTRA WHEELSMAN AT THE WHEEL.

We do not care about arguing this point at length. The Circuit Judge found the propeller in fault in this particular, and we think he was clearly correct. The master testifies that he is accustomed to have two men at the wheel in going into port. Fol. 401. The mate recognized himself the necessity of an extra wheelsman by ordering the lookout into the pilot house. Nothing could be more conclusive than these little items of evidence to demonstrate the necessity for this additional precaution, and this is by no means the only instance where a steam vessel has been condemned for the want of it.

In the case of the Europa already cited, the master testified as follows: "One hand only is usually placed at the wheel of the Europa at sea, in clear, moderate weather, with a fair wind, and the engine going at full speed and all sails set, for she steers as easily as a boat at such times. We sometimes have three hands at the wheel in an adverse gale of wind, and two where it is not quite so bad. Dr. Lushington left it to the trinity masters to determine whether one man was sufficient and they condemned the vessel upon this ground.

III.

THE COLORADO WAS RUNNING AT TOO GREAT SPEED, AND SHE DID NOT TAKE PROPER PRECAUTIONS BY STOPPING AND BACKING TO AVOID A COLLISION.

Her speed in the fog was five or six knots an hour.

It is now well settled that a propeller is bound at her peril to move at such a speed in a fog that by stopping and backing she can avoid an approaching vessel. Of course her rate of speed must be determined by the density of the fog, the probability of meeting other vessels and by the other circumstances of the case. This rule is clearly defined in the following cases:

The "Western Metropolis," 7 Blatch., 214.
The D. S. Gregory, 2 Ben., 166.
The Louisiana, 2 Ben., 371.

This subject was also fully considered by the Privy Council in the case of the Great Eastern in 1864. 2 Mar. Law cases 97.

This was a collision about 200 miles west of Cape Clear, between the steamer Great Eastern and the ship Jane. The Great Eastern was going at her usual speed of twelve and one half knots an hour, although the weather was thick, and was condemned for too great speed. In the opinion of Lord Kingsdown he says: Their Lordships do not mean to lay down any rule beyond that expressed in the articles themselves as to the occasion when a steam vessel is bound to moderate

her speed, or as to the rate which, in the circumstances described in the evidence, she ought not to exceed. But their Lordships are of opinion that it is the duty of a steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel and meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place.

The same principle was recognized in the steamer "Hansa," 5 Ben., 501 and 527, decided in 1872.

The Bristol, 4 Ben., 397.

The Blackstone, Lowell, 485.

This was a collision between a schooner and a large screw steamer between Boston and New York. The schooner was close hauled on the port tack intending to beat up to one side of the South Vineyard channel and come to anchor. After running so for some minutes she heard the whistle of a steamer and immediately ordered the fog-horn to be sounded, which was done several times. After a few minutes more the steamer was seen and was hailed to keep out of the way, but did not appear to change her course, and ran into the schooner near her bows, cutting her down and sinking her almost instantly. The Court observes, quoting the Monticello and the Batavia as to the question of speed, "this seems to make the fact of the collision a conclusive test of negligence in all cases in which the sailing vessel is in no fault." "Each case must depend on its particular circumstances. The decisions only prove that there is scarcely any speed that has not been held to be too great upon some state of facts."

In the case of the Monticello before Mr. Justice Clifford and Judge Shepley, a steamer running not less than eight miles an hour in a fog, collided with a sailing vessel in the ocean, thirty or forty miles from Cape Lookout, the Court observes: "The term is not capable of any definition which would apply to a speed of any given number of miles an hour alike under all circumstances. The only rule to be extracted from the statute and a comparison of the decided cases is that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable a steamer, under ordinary circumstances, seasonably, usefully and effectually to do the three things required of her in the same clause of the statute, namely, to slaken her speed or, if necessary, to stop or reverse."

The Frankland, L. R., P. C.—Also 1 Asp. Mar., L. C., 489.

Collision between two screw steamers off the coast of Norfolk.

In this case when the fog came on, the master of the Frankland who was on deck in charge of the vessel, ordered the engines to be

slowed, the whistle to be sounded, placing two hands at the wheel. Hearing the whistle approaching, the steamer apparently two points on his starboard bow and coming closer, he ordered the engines to be stopped. Suddenly he saw the steamers mast head and red light about a ships length distant, and apparently crossing his bow. Seeing a collision inevitable, he ordered the engines reversed at full speed, but the collision took place, the stem of the Frankland striking the port side of the other vessel with such force as to penetrate into the middle of the ship and sink her. In the opinion of the Privy Council the Frankland, upon hearing the whistle of the other vessel approaching, ought not only to have stopped, but to have reversed its engines until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was and which way she was proceeding, and by that means a collision would have been avoided. They base this opinion upon the ground that she heard the whistle many times, and that it was approaching her and had come very near to her, so near indeed that if the vessels had then stopped they would have been within hailing distance; that the Frankland should then not only have stopped but reversed her engines so as to stop entirely the headway of the vessei, and ought not to have waited until the vessels sighted each other.

The Batavia, 9 Moore, P. C., 286.

The Court thought it unnecessary to ascertain the precise rate of speed of the steamer, the witnesses having stated it at all the way from ten knots to one and a half—because they said that any rate of speed was too great that endangered other vessels in the river. In the case of the Europa, the Privy Council also decided that if the steamer was navigating at a rate which made it impossible for her to avoid a collision with a ship, discovering it only at a distance at which the motion could be discovered, that it followed as an inevitable consequence that she was sailing at a rate of speed at which it was not lawful for her to navigate. In the case of the Rossiter, Newb., it was held that a steamer entering the harbor of Chicago in the night at a speed of three and one half to four miles an hour while the river was full of craft, was running at too great speed.

In the case of the Robert and Ann, Holt, 55 and 58: A vessel navigating a fishing ground was condemned for running at the rate of three and a half knots an hour.

In the case of the Pennsylvania, 23 Law Times, 55: Privy Council condemned the steamer for running at seven knots an hour about two hundred miles to the eastward of Sandy Hook, holding that if the collision was inevitable when the barque first came in sight, it was the fault of the steamer for going at an improper rate of speed. This court, before which the same case was afterwards argued, sustained the ruling of the Privy Council so far as applied to the rate of

speed: "What is such speed may not be precisely definable. It must depend upon the circumstances of each case; but the purpose of the requirement being to guard against danger of collision, the speed should be reduced as the risk of meeting vessels is increased."

See also the Westphalia, 4 Ben., 404; the Magna Charta, 25 Law Times, 512; Asp. Mar. Law Cases, 153; where it was held that four or five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, 25 miles east of Gothland. This is is a very strong case.

In the case of the Hansa, already cited, the court observed: "The result of all authorities is that while the justifiable rate of speed will depend upon the circumstances of the case, there is no such criterion as that a steamer may go at a rate such as will enable her to stop within an assumed distance at which she may, under favorable circumstances, expect to hear fog horns or steam whistles if blown. The present case illustrates the folly of such a test. Neither vessel heard the signal of the other. Yet, on the evidence, each gave the proper signal."

"The barque could do nothing but what she did. The steamer could easily have been going at a less speed."

These words may be applied literally to the present case. It has not been charged that the barque was guilty of any fault. She had a proper lookout, kept her fog-horn going all the time, shortened her sail, and did everything that could have been done to avoid a collision. The steamer could easily have been going at a less speed.

See also—

Culbertson vs. Southern Belle, 18 How., 584.
The Scioto; Davies, 359.
The Sampson; 3 Wall., Jr., 14.

In the case of the Leo, 11 Blatch., 225, Mr. Justice Hunt condemned the steamer for a speed of six or seven miles an hour in a fog, off the coast of New Jersey, and observed: "The speed should be so moderate that the steamer may be under control and a collision avoided after the presence of the other vessel shall have been ascertained. Practically the same rule was adopted by Judge Woodruff, in the case of the Hammonia, 11 Blatch., 413.

The mate did not adopt the proper precautions.

The testimony on behalf of the propeller showed her mate had been hearing horns all about her. He first made ours, apparently, dead ahead, and very close. Under these circumstances, it was his duty instantly to stop, reverse her engines, and make no movement until the position of the barque had been accurately ascertained.

The Hypodame, 6 Wall., 216.

In this case it was held, that where a steam vessel is proceeding in the dark hears a hail before her from some source which it cannot or does not see, it is her duty to instantly stop and reverse her engine. Substantially the same rule was laid down in the case of the Northern Indiana, 3 Blatch., 92.

The testimony with regard to the speed of the propeller is substantially as follows :

John B. Hall, mate.

Says, Folio 80, just before the fog commenced our speed had been between nine and ten miles an hour—our usual speed.

Folio 304.—After the fog set in the speed of the vessel was checked. After she was checked our speed was four to five miles an hour.

Folio 316.—Q. What do you judge your speed was at the moment of collision.

A Our headway was nearly stopped. It might have been a mile an hour, and it might have been a half a mile an hour. It could not have been much ; don't think it would exceed a mile an hour.

With regard to the precautions taken after he had begun to hear horns, he testifies as follows :

Folio 303—I told the engineer it was thick—to let her go slow, and I commenced blowing the whistle. I took my station in front of the pilot house. I sounded it by a cord which runs to the pilot house—one branch runs alongside the pilot house and one on top of the pilot house.

Folio 304.—I heard other horns than those I finally heard on the Bridge ; it was five or ten minutes after I heard the other horns before I heard those on the Bridge ; heard one on the starboard hand about a beam, and I think two on the port hand about a beam. They seemed to be half or three quarters of a mile off. I heard a horn which afterwards turned out to be on the Bridge ; first heard one blast of the Bridge's ; it appeared to be directly ahead. It was between two and

three minutes after I first heard the Bridge's horn before the collision, I was then standing in front of the pilot house. I think the lookout and I both heard it at the same time; he asked me if I heard it and I told him yes. He said: Did you hear that horn? I said yes, and started for the pilot house. I went on top of the pilot house and stopped both engines; gave an order to the man at the wheel to port. That order was given just as I started to go on top of the pilot house. I gave the order to port immediately upon hearing the horn; went to the top of the pilot house as quick as I could get there; next thing I heard was two blasts nearly dead ahead. Ordered the wheel hard a starboard, and then backed the port engine; engine had been stopped under the previous order; backing on the port would swing our bows aport.

Folio 309.—Think the wheelsman had time to get the wheel; probably, a turn to port before I gave the order to starboard—about half a minute between the two orders to port and starboard; saw the wheel put to starboard and the port engine backed; heard two blasts again, nearly dead ahead; rang to back the starboard engine; supposed it was backed; port engine backed nearly a minute before I rang to back the other; they backed together about a half minute and down to the time of the collision. First saw the Bridge right under our bows, after I had rung to back the starboard engine.

Folio 318.—They got the wheel hard over under the order to starboard; think the vessel swung a point under this order; both engines were backing about half a minute before the collision.

Folio 331.—Says the lookout is wrong in swearing that he was with him on the promenade deck when he first heard the horn. I swear I was not down on the promenade deck when the horns of the other two vessels were heard.

Folio 335.—*Q.* If, when you struck the barque, you had been going from four to six miles an hour, would you not have probably gone into her from six to ten feet?

A. Yes, sir, I think we would.

Folio 337.—I gave the order to port just as I started for the top of the pilot-house; he must have got the wheel half a turn over before I got to the top of the pilot-house. I went hastily; probably did not take more than five seconds; when I got there I rang the bell to stop both engines; think the wheelsman had got the wheel about one turn to port before I gave him the order to starboard; don't think it would take five seconds to go from my station to the top of the pilot-house; wheel was about half a turn to port when I got to the top of the pilot-house; that was from three to five seconds after I gave the order to port, and then in three to five seconds longer he would have had it over one full turn to port, and at that point I gave him the order to hard-a-starboard. I rang the bell to back the port engine

probably, at the same sime I gave the order to hard-a-starboard. To stop both engines I have to pull two separate wires, one for each engine.

Folio 341.—*Q.* The lookout who helped put the wheel over swears as follows: "We had just got it hard-a-starboard when the collision took place." Is that correct or not?

A If he means he had just got it there and no more, he is not correct, for I think the wheel was hard over half a minute, because I could see and was watching it. Don't think the man who put the wheel over would be more likely to be correct than I.

Adam Haig, Engineer, Folio 355.

The speed of our vessel before the fog commenced had been about nine and a half miles an hour—our usual speed. Soon after the fog commenced I got an order from the mate to check down. She went, I should think, about three miles an hour after she was checked. She did not exceed four. Checked her down to about the same speed as I use when running around in a harbor. After I checked her down the first order I got was signals to stop both engines. Just as I got the order to stop my speed was about three miles an hour; the same it had been; I obeyed the order to stop both engines right off. It was about two minutes after I got the order to stop both engines before the collision. It might not exceed two minutes. It may have been a minute and a half. The next order I got was to back the port engine; this order was only a few seconds after the order to stop both. When I got the order to back the port engine, I backed it. The next order was to back the starboard engine; I did it. The order to back the starboard engine was about a half a minute after I got the order to back the port engine. Both engines backed. One backed about a minute, and the starboard about half a minute before the collision. They continued to back to the time of the collision. At the moment we struck our speed would not exceed a mile an hour, if it was that. I should think the headway was almost entirely stopped. Judging from the speed of our boat I do not think we could run into her a great ways, if we did at all.

Folio 361.—I never told Mr. Nolan, or anybody else, that at the time of the collision the vessel was under a slow check; that she was working only one engine, nor anything of that kind; or that at the time of the collision I was working only one engine. I never said to him that I was backing on one engine and going ahead on the other.

Folio 366.—Our speed could not have been to exceed a mile an hour when I got the order to back the starboard engine. That was about half a minute before the collision.

Upon a review of the above testimony and of the authority of this Court, and of the Privy Council in the cases above cited,

seems to us that the propeller, upon hearing the approaching horns of the barque, should not only have stopped her engines but instantly reversed them, so that her headway might have been wholly stopped at the moment of the collision.

Upon this point we also cite the following authorities:

The "Blackstone," 1 Low., 485.
"City of New York," 8 Blatch., 197.
The Northern Indiana, 5 Blatch., 92.
The Pennsylvania, 9 Blatch., 451.
The "Lloyds," Holt, 58.
The D. S. Gregory, 2 Ben., 166.
1 Pars. on Shipping, 576 and 580.

We claim, too, that the testimony of the officers of the propeller that she was going at a speed of only one mile an hour at the moment of impact is fully disproved by the testimony of other witnesses and by the indisputable facts of the case.

First. All the men on the Bridge (and they could form some estimate of the speed of the propeller) put it at the moment of the collision at from five to six knots an hour.

Geo. Stedman says five miles. Fol. 143.

Henderson says five or six miles. Fol. 180.

Nolan thinks fully six miles. Fol. 238.

Erskine says five knots. Fol. 278.

Capt. Stedman and Wood say the same. Fols. 53, 287.

This was about her speed after she was checked down in the fog—fol. 304, 371—and after she resumed her voyage. Fol. 117. 155.

Second. It is fully disproved by the depth of the cut on the bridge, which is estimated by none of the witnesses competent to judge at less than eight feet.

Capt. Stedman measured the abrasion on the propeller's bow in Chicago, and found it extended thirteen feet nine inches from the stem. Fol. 54.

Carlin measured the same abrasions twelve feet seven inches on the starboard side. Fol. 176.

Henderson says the propeller penetrated eight or ten feet, and within three or four planks of her main mast. Fol. 87.

McCollum says seven or eight feet, and that her stem penetrated within a short distance of her mainmast. Fol 107.

Geo. Stedman says eight feet and within three or four feet of the mainmast. Fol. 145.

Nolan says ten feet. Fol. 238.

Erskine, eight feet. Fol. 269.

Wood, eight or nine feet. Fol. 286.

In proof of this we also have the further fact that several of the bark's crew got aboard the propeller by getting on the rail of the bark, climbing her main rigging, which of course slanted inward, and jumping from that to the anchor stock of the propeller, which was three or four feet from the stem. Fols. 87. 108, 56, 188, 222. The oats were also boiling out of her and covering the water. Fols. 56, 109, 147, 229, 272.

To oppose this we have nothing but the estimate of Hall that she penetrated only eighteen inches—Fol. 321—and that of Armstrong, who confessed that he knew nothing about it. Fol. 375. The mate admits he would have run into her six to ten feet if he had been going from four to six miles. Fol. 335.

There was a general carelessness and recklessness in the management of the propeller, which seriously affects the credibility of their crew, and goes far to support the above positions. Two or three of our crew found the engine room empty that night while running through a dense fog. Fol. 115, 116, 125, 154, 155, 172. According to the wheelsman's statement, the mate had been reading a newspaper in the pilot house that evening. Fol. 115, 153, 235, 268.

IV.

THE PROPELLER WAS ALSO IN FAULT FOR NOT HAVING THE PROPER APPLIANCES FOR SIGNALLING THE ENGINEER FROM THE HURRICANE DECK IN FRONT OF THE PILOT HOUSE.

All lake propellers and steamers are provided with pilot houses, on top of which the master is accustomed to take his position on entering or leaving a harbor, and in other emergencies, in order that he may have the fullest possible view about him

both before and behind. The ordinary position of the master, however, is immediately in front of the pilot house and close to the wheelsman. In all properly constructed vessels there are two sets of wires running to the engine bells, one from the top and one from the front of the pilot house. The custom is so general, even upon small vessels, although we do not know that there is any direct evidence of it in this case, that the absence of it upon the Colorado seems very singular.

But aside from any evidence of custom, we claim that as a matter of law the officer of the deck is bound to be so near the engine bells, especially in a thick fog, that he may communicate with the engineer *instantly*, and without the necessity of running up to the top of the pilot house. For the want of such appliances, steamers were condemned in the following cases :

The "Europa," 1 E. L. & E., 557,563.
The "Forest Queen," 3 Ben., 182. 187.

V.

BUT IT IS CHARGED IN THIS CASE THAT THE BARQUE CHANGED HER COURSE.

There is certainly no direct evidence that she did. The testimony of her crew, is uniformly to the point that she did not.

CAPT. STEDMAN says, Fol. 51, "From the time we heard the propeller's whistle, there had been no change in our course. There was no change made up to the time of the collision."

GEORGE STEDMAN says, Fol. 139, "There was no change of course."

DANIEL MCKINNON says, from the time he took the wheel until the collision, his course was "full and by" S. E. by E. Fol. 184 and 185. On Fol. 303 he says, "The last order the captain gave, was to keep a good full on her; and then when she was headed into us, he told me to shove her wheel hard up." He forgets whether he had it hard up or not when she struck, but about the time he was putting his wheel hard up, the

second mate was shouting to the men on the propeller to back her. Fol. 205.

PATRICK W. NOLAN says, Fol. 243, "After we heard the first whistle, the barque kept on her course until the collision. There was nothing done on the barque to prevent a collision, except to keep a fog horn blowing, and a good look out kept up."

LINCOLN H. ERSKINE, lookout, says, Fol. 263, "The vessel did not change her course after we were on this tack."

Now, unless these witnesses have all sworn falsely, and wilfully falsely, this vessel did not change her course until the moment of collision, when of course under repeated rulings of this court, it would not be a fault. It seems that as the propeller was coming into them, her wheel was put hard-a-starboard. Argument is made that because some of the witnesses swore that they first heard the propeller's whistle about two points off their starboard bow, and first made her white light in about the same direction; that as the vessels came together nearly at right angles, the barque must have changed her course to bring about these results.

The angle of collision, however, is a matter of considerable uncertainty. The men on the propeller put it at four points, Fol. 343, while some on the barque make it nearly a right angle.

There is a similar discrepancy with regard to the bearing of the propeller's light when first made.

The master, who first made the propeller's masthead light from underneath the mizzen cross-trees, locates it four points off his starboard bow. Fol. 50.

GEO. STEDMAN, who says he made the propeller's light about one point on his weather bow, said that it seemed to him that she changed her course to point for the barque, and that at the time she changed her course the light bore about one point on her weather beam. Fols. 140 to 143. It seems the light disappeared for a moment, and when he picked it up again it was off the weather bow three or four points. Fol. 170.

The wheelsman says—Fol. 204 and 205—that as the pro-

peller was heading into him the master ordered him to shove the wheel hard up, and that about this time the second mate and captain were shouting to the propeller to back her up This is corroborated by the mate of the propeller, who says he heard the order on the barque, "Hard up that wheel.' Fol. 315. And that this was after he saw the Bridge. Fol. 343. This indicates clearly that up to that time the course of the barque had not been changed.

The lookout says that at the time this order was given the propeller was within a length and a half of the barque. Fol. 268. It is unnecessary to decide exactly *how* the vessels assumed their relative positions at the time of the collision. It appears that the wheel of the propeller was first ported and then starboarded; and that when the collision was inevitable the wheel of the bark was put hard a starboard. A slight change on the part of both vessels would have brought them nearly at right-angles with each other. There is certainly nothing to justify the inference that the barque had changed her course until the collision had become inevitable.

There is negligence clearly proven on the part of the propeller. To hold the barque there must be clear proof of contributing fault or negligence on her part. As observed by Judge Woodruff, in the case of The Comet, 9 Blatch. 329, "When the libellants come into court themselves showing neg-"ligence and want of skill, and seek to cast the burden of its "consequences in part upon another vessel, there is some pre-"sumption at least adverse to their claim, and they may pro-"perly be held to clear proof of contributing negligence or "fault in the management of the other vessel. Their own "negligence sufficiently accounts for their disaster, and it "should not be enough that they make the care and skill and "good management of the other vessel doubtful.

It will not be claimed that if a change of course on the part of the barque was made after the danger of collision had become imminent, that it would be a fault. The decisions of this court are numerous to the point that where a vessel has been brought into immediate danger of collision by the culpa-

ble negligence of another vessel, any movement on her part made in the confusion and excitement of the moment, will not be regarded as a fault.

Nor can the barque be charged with the fault of carrying too much sail. This court has held in the case of the Morning Light, 2 Wall, 550, that under similar circumstances a vessel is under no obligation to shorten sail at all, and yet we find the barque in this case taking in all her light sails and reducing her speed as much as she dared.

See also the Ebenezer, 2 W. Rob, 206.
The Itinerant, 2 W. Rob, 236.

Nor was there any fault on the part of the crew in abandoning their vessel, as they had reasonable grounds to apprehend her sinking.

Stokes vs. Saltonstall, 13 Pet., 181.
Murphy vs. Palgreave, 3 Mar. Law cases, 284,
Jones vs. Boyce, 1 Stark, 493.

Complaint is also made that the barque did not ring a bell instead of sounding a horn. Under the decision of this court in the case of the Pennsylvania, 19 Wall, 125, the ringing of a bell would have been a fault if the other vessel was thereby misled.

We do not desire to discuss here the question of inevitable accident. It seems to us the fault on the part of the propeller is clearly proven. Inevitable accident has been lately defined by the Privy Council, in the case of the Marpesia, L. R. 4, P. C., 212, and by this court in the case of the Grace Girdler, and we shall not seek to question the correctness of those definitions.

In conclusion, we ask your honors to compare the relative watchfulness and care exercised by these vessels on the night in question.

On the part of the barque we find an extra watch kept on deck; the sail shortened; a man blowing horns at intervals of one minute for a long time previous to the collision, and hearing the propeller's whistle, the master and second-mate

now on deck and now on the mizzen cross-trees, intently listening for signals and looking for lights.

We find the propeller, however, navigating a frequented track in a dense fog, with no greater care than would be required in a clear day; not an extra hand on deck; but a single lookout, and he apparently ignorant of his duties; nobody at the mast-head; no extra man at the wheel, the master lying quietly in his berth, and although aroused by the mate paying no attention to his request to come on deck. Certainly a collision under such circumstances could not have taken him by surprise.

We submit with confidence that the decree of the Circuit Court should be affirmed.

NEWBERRY, POND & BROWN,
Proctors for Libellant.

H. B. BROWN,
J. S. NEWBERRY, } *Advocates.*

SUPREME COURT OF THE UNITED STATES.

THE PROPELLER COLORADO, CHARLES ENSIGN, AND GEORGE W. HOLT, CLAIMANTS AND APPELLANTS,

vs.

ELON W. HUDSON.

BRIEF ON THE PART OF THE APPELLANTS.

GEORGE B. HIBBARD, for the Appellants,
BUFFALO, N. Y.

Supreme Court of the United States.

THE PROPELLER COLORADO,
CHARLES ENSIGN, and
GEORGE W. HOLT,
Claimants and Appellants,
vs.
ELON W. HUDSON.

Brief on the part of the Appellants.

GEORGE B. HIBBARD, *for the Appellants, Buffalo, N. Y.*

Appeal from a decree of the Circuit Court of the United States for the Eastern District of Michigan, in favor of the Libellant, Elon W. Hudson, against the Appellants, claimants of the propeller Colorado, for $35,987.19, and affirming a decree of the District Court of that district.

This is a case of collision which happened between the propeller Colorado and the barque H. P. Bridge. The collision occurred upon Lake Huron, about twelve o'clock at night, of the 11th of May, 1869 (Fols. 42, 300, 301*). The barque and her cargo were lost in consequence of the collision, and the libel in the case was filed by Elon W. Hudson, as owner of the barque, and as a common carrier, against the propeller and her master to recover the value of the barque, her freight, and certain brick laden on board of her (1, 8. 9, 10).

At the time of the collision, the barque, well-manned, &c., carrying a cargo of oats, and with some brick on deck, was bound from Milwaukee to Buffalo. (40, 409. *Original Record, printed page* 57, *original* 198).

The propeller, well manned, &c., carrying general merchandise, was bound from Buffalo to Chicago. (390, 409. *Original Record, printed page* 55, *original* 190).

At and for some time before the collision, a fog, as to the density of which the testimony differs—the testimony on the part of the barque making it appear not so dense (Libel, 2, 70, 71, 86, 122, 160, 161, 242) as that on the part of the propeller (302, 371). Unquestionably, however, the fog was very considerable.

The barque was proceeding on a course S. E. by E. (47, 166), the wind being about south (166, 370, 409). The barque was nearly close-hauled on her starboard tack, but with a "good full on her" (5, 73, 185.)

---

* References in this brief, when made to the original record as printed, will be specially mentioned as so made to the pages of the record. Other references of the kind will be to the folios of the amendments or corrections of the record, made by stipulation.

Supreme Court of the United States.

THE PROPELLER COLORADO,
CHARLES ENSIGN, and
GEORGE W. HOLT,
Claimants and Appellants,
vs.
ELON W. HUDSON.

Brief on the part of the Appellants.

GEORGE B. HIBBARD, *for the Appellants, Buffalo, N. Y.*

Appeal from a decree of the Circuit Court of the United States for the Eastern District of Michigan, in favor of the Libellant, Elon W. Hudson, against the Appellants, claimants of the propeller Colorado, for $35,987.19, and affirming a decree of the District Court of that district.

This is a case of collision which happened between the propeller Colorado and the barque H. P. Bridge. The collision occurred upon Lake Huron, about twelve o'clock at night, of the 11th of May, 1869 (Fols. 42, 300, 301*). The barque and her cargo were lost in consequence of the collision, and the libel in the case was filed by Elon W. Hudson, as owner of the barque, and as a common carrier, against the propeller and her master to recover the value of the barque, her freight, and certain brick laden on board of her (1, 8. 9, 10).

At the time of the collision, the barque, well-manned, &c., carrying a cargo of oats, and with some brick on deck, was bound from Milwaukee to Buffalo. (40, 409. *Original Record, printed page* 57, *original* 198).

The propeller, well manned, &c., carrying general merchandise, was bound from Buffalo to Chicago. (390, 409. *Original Record, printed page* 55, *original* 190).

At and for some time before the collision, a fog, as to the density of which the testimony differs—the testimony on the part of the barque making it appear not so dense (Libel, 2, 70, 71, 86, 122, 160, 161, 242) as that on the part of the propeller (302, 371). Unquestionably, however, the fog was very considerable.

The barque was proceeding on a course S. E. by E. (47, 166), the wind being about south (166, 370, 409). The barque was nearly close-hauled on her starboard tack, but with a "good full on her" (5, 73, 185.)

---

* References in this brief, when made to the original record as printed, will be specially mentioned as so made to the pages of the record. Other references of the kind will be to the folios of the amendments or corrections of the record, made by stipulation.

The barque's speed was about four or five miles an hour (45, 47, 186).

The barque had her light and upper sails stowed—having nothing set above the top-gallant-sail (4, 45, 137, 161), and was carrying her signal lights in her mizzen rigging, close to the rail (71, 167).

While the barque was thus proceeding, the fog-whistle of the propeller was heard for a long time on the barque—about three-quarters of an hour, between forty and fifty minutes—before the collision—*from forty to fifty minutes, according to the testimony of the captain of the barque, who swears he noticed the time by the clock* (68, 69, 70, 73, 63), and who also swears that he heard the fog-whistle when, as he estimates the distance, the propeller was off from four to five miles (74).

The fog-whistle of the propeller was not heard, however, by the lookout of the barque, *the man who blew her fog-horn*, or by Nolan, who was forward with him, for but a short time—*about five minutes* before the collision (219, 243, 263, 268).

There is evidence on the part of the barque that her fog-horn had been sounded for a considerable time before the collision. This, however, is one of the questions of fact in the case. (See *Post, Point Second*, I, II). The proof upon the part of the barque, as to the quality of the horn, is in the evidence of the man who blew it, and who testifies as follows: "I should say that the horn could have been heard at least *half-a-mile* against the wind, and as there was not much wind, it ought to have been heard a great ways off" (263, 264). It appears, however, by evidence on the part of the libellant, that, even with shortened sail, and when nearly close-hauled, the barque's speed was about four or five miles an hour (45, 47, 186), and, of course, the propeller was to windward.

The light of the propeller first made from the barque (the propeller's lights were, a white light at the mast-head, and two colored lights properly placed on her arches (325, 320, 349), was the propeller's mast-head light. This, the captain of the barque swears he made from the mizzen cross-trees of the barque (he having gone aloft), and a short time before the collision (49). He then, on account of the fog, could see no other light on the propeller (50).

The libel alleges that there was no change of course on the part of the barque, from the time the propeller's whistle was heard, up to the time of the collision (8), and other testimony on the part of the barque states this allegation to be true (50, 51, 75, 139).

As to the navigation of the propeller, it appears that:

The fog commenced about eleven o'clock (355, 301, 70); that just before the fog commenced the speed of the propeller was between nine and ten miles an hour (301, 355), the usual speed of the propeller, although she could go faster if driven (301); that when the fog came on, by order of the master, the speed of the propeller was slackened and her fog-whistle blown, and she continued to run with slackened speed, sounding her fog-whistle (302,

303); that the speed of the propeller, after it was slackened, and down to the time when her watch first became aware of the proximity of the barque, was, according to the positive testimony of her engineer (and who measured her speed by the revolutions of her engine (363, 364), not more than three miles an hour—about the same speed as in running around in a harbor—(363, 364, 355, 356); and, according to the estimate of her mate, four to five miles an hour (304); and, according to the testimony of the engineer, at the time the vessels struck not to exceed a mile an hour (358, 366). The estimates of the witnesses on the part of the barque (but, of course, they had slight opportunity for observation), was that the speed of the propeller was about five or six miles an hour (55, 117, 238, 287).

The propeller was at first so proceeding in the fog on a N.N.W. course (301). Her first mate was officer of the deck, and was standing in front of the pilot-house. Armstrong was on the look-out, forward on the promenade deck. Walsh was at the wheel; and Haig, the first engineer, was in charge of the engine (303, 304, 354, 371).

While so proceeding a single blast of a horn was heard, apparently dead ahead, at a time estimated at about two or three minutes before the collision (306, 372), and was heard by the mate and lookout both at the same time, and they spoke about it at the time (306, 373). This horn, as a matter of fact, had, and was understood by both vessels to have, a plain significance—that a vessel on which it is blown is on the port tack (319, 158).

As soon as this horn was heard, and knowing, of course, that the vessels were close together, the mate ordered the wheel aport, stepped to the top of the pilot-house, about nine or ten feet above where he was standing, which would take him, as is estimated, from three to five seconds (328, 338 339), and rang to stop, and the engines were stopped (306, 356).

Very soon after, and before the wheel of the propeller was over under the port order more than one-third (308, 309, 347), two blasts of a horn were heard, apparently nearly dead ahead also (307, 373), indicating that the vessel on which the horn was blown was on the starboard tack (319, 158). The mate thereupon ordered the wheel hard a-starboard, and rang the bell to back the port engine (which would help the vessel to swing under her starboard wheel), and the lookout stepped into the wheel-house to help put the wheel over (307, 308, 309, 373, 374).

Very soon two blasts of the fog-horn were heard again, still apparently nearly dead ahead, when, the wheel having been put hard a-starboard, the starboard engine was also backed (311, 312, 374, 375), and the vessels came together, an injury being inflicted upon the barque, to an extent, as to which the witnesses differ (269, 87, 55, 176, 320, 374, 375), the propeller moving very slowly, with her headway nearly stopped, her speed not to exceed a mile an hour, according to the statement of her engineer (359, 366).

Before the horn of the barque was heard other horns had been heard on the propeller, one on the starboard side about abeam, and one or two on the port side about abeam, apparently about half or three-quarters of a mile off (305, 335, 372, 380).

In a short time the vessels were disengaged from each other—the propeller's engines having been stopped to prevent her backing away from the barque (319), and the vessels' sails keeping them together (399, 400), and they lay together for about an hour before the barque disappeared (359, 323, 372).

Very soon after the happening of the collision, the officers and crew of the barque left her, and came on board the propeller (55, 56, 87, 222, 223, 248, 265, 285, 320, 398).

These, it is claimed, are the leading facts appearing in the case. Minutiæ of testimony and less important facts can be best considered beneath the particular points hereinafter made.

The questions involved in the case, it is claimed, are:

1st. Was the propeller in fault in not having sufficient watch on deck, or lookout?

2d. In not having her watch on deck, or lookout, or any of them, properly placed?

3d. In proceeding at too great a rate of speed?

4th. In anything done after the fog-horn of the barque was heard upon her?*

Was the barque in fault:

1st. In not having a proper fog-horn, or in not properly sounding her fog-horn?

2d. In not changing her course?

3d. In proceeding at too great a rate of speed?

4th. And, were her officers and crew in fault, in abandoning her so soon as they did after the collision?

And—

Was the collision one happening from "inevitable accident."

The District Court decided that the propeller was in fault, and pronounced a decree in favor of the libellant for $33,675.26, for the loss of the barque, her freight, and the brick laden upon her (*Original Record, printed pages*, 77, 79, 94, 96, *original*, 253, 258, 308, 314). This decree the Circuit Court affirmed, and pro-

*The cause was heard and argued in the Circuit Court on the 11th, 12th and 13th of December, 1872 (*Original Record, printed pages* 81–82, *original* 267, 268, 269, *as corrected by the stipulation, amendments, &c., page* 120). On the last day of the argument in the Circuit Court, on the 13th day of December, 1872, the libellant obtained leave to amend his libel (*Original Record, printed page* 82, *original* 269–270. *After the argument in the Circuit Court*, and on the 20th day of December, 1872, the libellant filed an amendment to his libel, alleging that the propeller "was not constructed with proper facilities for signalling the engineer" (*Original Record, printed pages* 82–83, *original* 270). As it is claimed, there is not a particle of proof in the case to support any such allegation, the appellants claim there is no such question involved in the case.

nounced a decree against the appellants, claimants of the propeller, for $35,987.19. (*Original Record, printed page* 83, *original* 272), and from this decree the appellants appealed.

The appellants assign the following errors in the decree in the Circuit Court, and allege that the decree of that Court is erroneous as follows:

First. That there was error on the part of the Circuit Court in the following particulars:

1st. In deciding that there was any fault on the part of the propeller.

2d. In not deciding that there was fault on the part of the barque, in not having a proper fog horn, and in not properly sounding her fog horn.

3d. If the speed of either vessel was too great, in not deciding that the speed of the barque was too great.

4th. In not deciding under the circumstances of the case, that the barque was in fault in not changing her course and avoiding the collision.

5th. In case there was no fault on the part of the barque, in not deciding that the collision happened from "inevitable accident."

6th. In not deciding that the officers and crew of the barque improperly abandoned her, and that she and her cargo were lost thereby.

7th. In deciding that the value of the barque was so great, as it decided it was, and in not sustaining the exception (*Original Record, printed page* 78, *original* 255–256) as to the value of the barque (the District Court having overruled the exception in that respect, and the Circuit Court having, in this respect, affirmed the decision of the District Court) (*Original Record, printed pages* 78, 96, 79, 82, *original* 255, 256, 313, 260, 261, 271, 272).

Second. That there was error on the part of the District Court, and in the decree of that court, in the same particulars as in those above mentioned in the decree of the Circuit Court (*Original Record, printed pages* 78–79, *original* 258–259).

Third. That there was error on the part of the Circuit Court, and in the decree of that court, in adjudging and decreeing that the libellant recover from and against the appellants and their sureties the sum of $35,987.19; and error in adjudging and decreeing that the libellant recover costs against the appellants and their sureties. The decree of the District Court should have been reversed, with costs, and the libel in the cause dismissed, with costs (*Original Record, printed page* 83, *original* 271–272).

Fourth. That there was error on the part of the District Court,

Before the horn of the barque was heard other horns had been heard on the propeller, one on the starboard side about abeam, and one or two on the port side about abeam, apparently about half or three-quarters of a mile off (305, 335, 372, 380).

In a short time the vessels were disengaged from each other—the propeller's engines having been stopped to prevent her backing away from the barque (319), and the vessels' sails keeping them together (399, 400), and they lay together for about an hour before the barque disappeared (359, 323, 372).

Very soon after the happening of the collision, the officers and crew of the barque left her, and came on board the propeller (55, 56, 87, 222, 223, 248, 265, 285, 320, 398).

These, it is claimed, are the leading facts appearing in the case. Minutiæ of testimony and less important facts can be best considered beneath the particular points hereinafter made.

The questions involved in the case, it is claimed, are:

1st. Was the propeller in fault in not having sufficient watch on deck, or lookout?

2d. In not having her watch on deck, or lookout, or any of them, properly placed?

3d. In proceeding at too great a rate of speed?

4th. In anything done after the fog-horn of the barque was heard upon her?*

Was the barque in fault:

1st. In not having a proper fog-horn, or in not properly sounding her fog-horn?

2d. In not changing her course?

3d. In proceeding at too great a rate of speed?

4th. And, were her officers and crew in fault, in abandoning her so soon as they did after the collision?

And—

Was the collision one happening from "inevitable accident."

The District Court decided that the propeller was in fault, and pronounced a decree in favor of the libellant for $33,675.26, for the loss of the barque, her freight, and the brick laden upon her (*Original Record, printed pages*, 77, 79, 94, 96, *original*, 253, 258, 308, 314). This decree the Circuit Court affirmed, and pro-

*The cause was heard and argued in the Circuit Court on the 11th, 12th and 13th of December, 1872 (*Original Record, printed pages* 81–82, *original* 267, 268, 269, *as corrected by the stipulation, amendments, &c., page* 120). On the last day of the argument in the Circuit Court, on the 13th day of December, 1872, the libellant obtained leave to amend his libel (*Original Record, printed page* 82, *original* 269–270. *After the argument in the Circuit Court*, and on the 20th day of December, 1872, the libellant filed an amendment to his libel, alleging that the propeller "was not constructed with proper facilities for signalling the engineer" (*Original Record, printed pages* 82–83, *original* 270). As, it is claimed, there is not a particle of proof in the case to support any such allegation, the appellants claim there is no such question involved in the case.

nounced a decree against the appellants, claimants of the propeller, for $35,987.19. (*Original Record, printed page* 83, *original* 272), and from this decree the appellants appealed.

The appellants assign the following errors in the decree in the Circuit Court, and allege that the decree of that Court is erroneous as follows:

First. That there was error on the part of the Circuit Court in the following particulars:

1st. In deciding that there was any fault on the part of the propeller.

2d. In not deciding that there was fault on the part of the barque, in not having a proper fog horn, and in not properly sounding her fog horn.

3d. If the speed of either vessel was too great, in not deciding that the speed of the barque was too great.

4th. In not deciding under the circumstances of the case, that the barque was in fault in not changing her course and avoiding the collision.

5th. In case there was no fault on the part of the barque, in not deciding that the collision happened from "inevitable accident."

6th. In not deciding that the officers and crew of the barque improperly abandoned her, and that she and her cargo were lost thereby.

7th. In deciding that the value of the barque was so great, as it decided it was, and in not sustaining the exception (*Original Record, printed page* 78, *original* 255–256) as to the value of the barque (the District Court having overruled the exception in that respect, and the Circuit Court having, in this respect, affirmed the decision of the District Court) (*Original Record, printed pages* 78, 96, 79, 82, *original* 255, 256, 313, 260, 261, 271, 272).

Second. That there was error on the part of the District Court, and in the decree of that court, in the same particulars as in those above mentioned in the decree of the Circuit Court (*Original Record, printed pages* 78–79, *original* 258–259).

Third. That there was error on the part of the Circuit Court, and in the decree of that court, in adjudging and decreeing that the libellant recover from and against the appellants and their sureties the sum of $35,987.19; and error in adjudging and decreeing that the libellant recover costs against the appellants and their sureties. The decree of the District Court should have been reversed, with costs, and the libel in the cause dismissed, with costs (*Original Record, printed page* 83, *original* 271–272).

Fourth. That there was error on the part of the District Court,

and in the decree of that Court, in ordering, adjudging and decreeing that the libellant recover of the claimants in the cause $33,675.26, and interest and costs; and in ordering, adjudging and decreeing that judgment be entered against George W. Holt, Edmund Trowbridge and John Pridgeon for the said sum, interest and costs; and in ordering that execution issue. The libel in the cause should have been dismissed, with costs (*Original Record, printed pages* 78–79, *original* 258–259).

Fifth. That there was error on the part of the District Court, and in its decree, in not sustaining the exception as to the value of the barque (*Original Record, printed page* 78, *original* 255).

Sixth. That there was error on the part of the Circuit Court, and in the decree of that court, in affirming the decree of the District Court upon whatsoever ground or grounds the affirmance was placed; and error in not reversing the decree of the District Court, and in not dismissing the libel in the cause.

FIRST.

The propeller was not in fault; and as she was not in fault—whether the collision be regarded as the result of "inevitable accident," or otherwise, the propeller cannot be responsible, in any degree, for the consequences.

Peck vs. Sanderson, 17 *Howard*, 178.
The William Lindsay, (*E. L. R.*) 5 *Priv. C. App.* 338, 343.

I. In consideration of the questions to be presented under this point, the language of several articles of the Act of Congress, with respect to avoiding collisions, will require attention.

"Rules Governing Fog-Signals.

Fog-Signals.

"Article 10. Whenever there is a fog, whether by day or "night, the fog-signals described below shall be carried and used, "and shall be sounded at least every five minutes, viz.:

"(*a.*) Steamships under way shall use a steam whistle placed "before the funnel, not less than eight feet from the deck.

"(*b.*) Sailing-ships under way shall use a fog-horn.

"(*c.*) Steamships and sailing-ships when not under way shall "use a bell."

* * * * * * *

"*Sailing-ship and ship under steam.*

"ARTICLE 15. If two ships, one of which is a sailing-ship and "the other a steam ship, are proceeding in such directions as to "involve risk of collision, the steamship shall keep out of the "way of the sailing-ship."

"*Ships under steam to slacken speed.*

"ARTICLE 16. Every steamship, when approaching another "ship so as to involve risk of collision, *shall slacken her speed, or,* "*if necessary, stop and reverse;* and every steamship *shall, when* "*in a fog, go at a moderate speed.*"

"*Vessels overtaking other vessels.*

"ARTICLE 17. Every vessel overtaking any other vessel, shall "keep out of the way of the said last mentioned vessel."

"*Construction of Articles* 12, 14, 15 *and* 17.

"ARTICLE 18. Where by the above rules, *one of two ships is* "*to keep out of the way, the other shall keep her course,* SUBJECT "TO THE QUALIFICATIONS CONTAINED IN THE FOLLOWING ARTICLE:

"*Proviso to save special cases.*

"ARTICLE 19. In obeying and construing these rules, due re-"gard must be had to all *dangers of navigation*, and due regard "must also be had to any *special circumstances which may exist* "in any particular case, rendering a *departure* from the above "rules necessary in order to avoid immediate danger."

"*No ship under any circumstances to neglect proper precautions.*

"ARTICLE 20. Nothing in these rules shall exonerate any "ship, or the owner, or master or crew thereof, from the conse-"quences of any neglect to carry lights or signals, or of any "neglect to keep a proper lookout, or of the neglect of any *pre-*"*caution* which may be required by the ordinary practice of "seamen, *or by the special circumstances of the case.*"

13 *Stat. at Large*, 60, 61.

II. Of course, as is substantially indicated by the District Judge in his opinion (430), the duty on the part of the steam vessel is not *absolutely* to keep out of the way in any case. She is only obliged, under the circumstances, to observe the proper rules prescribed for her keeping out of the way—to be not guilty of any *fault*—to properly act *under what she can know at the time.* To hold aught else to be the rule, would be to exclude the idea of human fallibility in the navigation of steam vessels—to exclude all idea of "inevitable accident." Nor, in such a case as this, is there any presumption that the steam vessel is in fault.

Post, Point First, IV., 2.

III. Under whatever rule the case should be considered, the propeller in this case was without fault, and cannot be held, in any measure, responsible for the consequences of this collision.

Fault in collision cases, is not some point on which criticism may rest. It is not some point of conduct which a court may think to be even erroneous or a mistake. To condemn a vessel because in the opinion of any court, no matter how elevated, she may have been in error or mistake—when it is not found that she has committed distinct *fault*, is but to substitute the opinions of men for the science of the law—science as applicable to collision cases as to any other. To commit a *fault* is to violate some law, some rule, some custom, not merely to err, and unless such *fault* is established against a vessel she cannot be held responsible.

Collision cases can never be decided so that precedent may establish practical and plain rules of navigation—rules which, above all others, should be plain and practical—without the steady application of these principles.

Faults in such cases are but few. They should be but few, and laws, rules or customs in violation of which such faults only can exist, should be plain and few, that plain and practical men, compelled to act, often without opportunity for deliberation or consultation, should be ever ready for their instant application.

Nor, is it sufficient to condemn a vessel, even to conclude that, perhaps, more care might have been used.

"Fault"—infraction of law, rule or custom, *the actual doing or not doing, as the case may be, of one or more of a few substantial things*, must be affirmatively shown, against a vessel before responsibility, upon her part, can follow.

These principles, it is contended, are not to be disputed, if law is a science, if there be law, which is rule, with respect to collision cases.

No fault, it is most confidently claimed, was committed upon the part of the propeller, in this case.

1. The speed of the propeller was not too great.

a. Under Article 16, she was required, when in a fog, to go at a "moderate speed;" and in all cases, when "approaching another ship, so as to involve risk of collision," to "slacken her speed, or, if *necessary*, stop and reverse."

A steam vessel is not required in a fog to lie still. To lie still would be to leave her an inert mass on the water, incapable of avoiding collision; and she "*shall* (to quote the imperative language of the statute) when in a fog go at a moderate speed."

The question of what is "moderate speed" in such cases, has, at different times, received consideration, but no rule has been established, it is claimed, by this Court, absolutely defining it, as yet. Beneath the rigid language of some of the cases, beneath the language employed by the District Judge in this case, moderate speed has been regarded to be such, as will enable a steam vessel to be stopped within a distance less than that at which another can be seen. That may be so in some cases. But however numerous may be the citations as to the rule, such will not, it is most confidently claimed, be settled to be the rule by this Court, in such a case as this. To hold such to be the rule, once more it may be said, would be to exclude the idea of human fallibility—to make human ability accurately calculate the ever changing density of fogs, and in all such cases, guaranty against collision. It would be to exclude the idea of "inevitable accident" (which certainly cannot occur in ordinary circumstances), in cases where collision has happened from fog, or the darkness of the night as in the cases of the *Morning Light*, the *Grace Girdler* and the *Marpesia* (*Post*, *Point First*, IV., 3); or, to make steam vessels liable when not in fault, contrary to the doctrine of such cases as *Peck vs. Sanderson* (*Post*, *Point Second*, III.)

If the law be, as it has been said to be in some cases not authoritative in this Court, in this respect, then in no such cases could steam vessels ever escape responsibility. This would be the argument against them: You are bound to keep out of the way of sail vessels. You are bound to have good lookout and see sail vessels. If you do not, you are responsible. If you do see them, you are bound to go at such speed, under all circumstances, that you shall not hit them, and if you do hit them you are responsible.

If such argument can prevail, then indeed should such cases as the *Morning Light*, the *Grace Girdler*, the *Marpesia*, and *Peck vs. Sanderson*, and many equally authoritative cases, be blotted from the books. The rule as to speed in such cases must be, as in all other actions founded on alleged negligence, that the speed must be such moderate speed as a competent and careful officer of a vessel would judge to be safe and proper, under the circumstances. If he should err in this, it would not be *fault*.

The Pennsylvania, 19 *Wallace*, 125, 133.

b. As a matter of fact, the speed of the propeller was moderate. It was intended to be moderate and a compliance with the law, as is shown by the checking down of the speed of the vessel.

The evidence of the engineer of the propeller, who proves by actual measurement that the speed of the propeller, after the fog commenced, would not exceed three miles an hour (363, 364, 355, 356) is conclusive on this point. It is much more to be relied upon than any estimate of speed made by any others, of either crew.*

Such speed (and certainly there is no proof that it was excessive, and really, it is claimed, it was only enough to give the propeller steerage way), as a matter of common knowledge, was moderate.

Such speed—the speed of a man's slow walk—must be concluded to have been moderate—to have been such that a competent and skillful man would not have hesitated to have pursued; such as he might properly expect would give ample opportunity to avoid collision with any other vessel; and most certainly so, should the other vessel properly sound her fog horn, even if it could not be heard more than half a mile. To run half a mile at such a rate of speed would take the propeller about ten minutes—a long time in such cases, thrice the time necessary to have avoided any sail vessel properly sounding a proper fog horn, and in this respect, it must be remembered that this collision, it is claimed, did not take place in any thoroughfare of vessels. It was in the broad lake.

It must, therefore, be concluded that the speed of the propeller was not otherwise than moderate—that there was no *fault* in this respect, and it is boldly claimed, that no case, certainly no authoritative case, can be found in the books holding such speed a fault, under such circumstances.

---

* All conjecture as to the speed of the propeller, based upon evidence as to how far she cut into the barque, or as to green paint on the bow of the propeller, should not be regarded. Upon the part of the barque it is attempted to be proved by the evidence of men hastily leaving a vessel which had just encountered a collision, that the propeller cut into the barque several feet (269, 87, 55,) and that the marks upon the propeller's stem showed this (176, 55.)

Upon the part of the propeller the evidence shows that the propeller did not cut into the barque but little, if any, (320, 334, 375,) and, it is contended, that if the propeller with her immense weight had hit the barque at any such speed as is claimed on the part of the barque, the barque would have been so injured that she would have sunk almost instantly, instead of remaining afloat, as she did, about an hour (359, 323, 372, 395), and then floating off into the fog without being seen to sink; and the green paint is accounted for as having got on to the propeller by rubbing around harbors (396), and what are claimed to have been oats floating on the water, it is contended, is shown to have been scum from the propeller's syphon (394, 324, 403, 229).

All conjectures as to the speed of the propeller, based on such evidence, are far too fanciful, all mere opinions as to the propeller's speed under the circumstances too unreliable, to overcome the positive evidence of the engineer, who knew what the speed was, measured it, and was the only man who could know, and whose evidence, it is claimed, shows conclusively, that the propeller's speed did not exceed three miles an hour.

The Pennsylvania, 19 *Wallace*, 125, 134.
The Marpesia (*E. L. R.*), 4 *Priv. C. App.*, 213, 220.

2. The watch on the propeller's deck was entirely competent and proper.

a. She had on duty, engaged in her navigation, her first mate, who beyond all question was entirely competent, and who, it is claimed, was properly placed, within common knowledge, in front of the pilot house. Nor, is it of any importance to speculate as to what would have been the consequences, if he had been on the top of the pilot house, instead of in front of it. He was only nine or ten feet from the bell pull by which orders are given to the engineer, a distance which it would take him not more than five seconds at most to overcome (338, 339). Are we to speculate here as to what would have been the consequences, had not this almost inappreciable point of time, intervened before the order to stop the engine could be given, and dispose of this large amount of money by guess?

There was no *fault* in the officer's occupying that position. *The libellant has not proven or shown there was any fault in this respect*—that the place where the officer stood, or the equipment of the vessel was in any respect wrong (and certainly the burden of proof is on the libellant in that respect), or that anything, on the part of the propeller, was in any regard wrong.

Had the officer been on top of the pilot house, when his vessel was in the broad lake, his position might well have been criticisable.

b. That the lookout was properly placed is beyond question (304). Nor can anything be said against his competency. He was an experienced seaman, with qualifications much beyond those required for a lookout (368). He did nothing but look out, did not leave his position, and swears *he kept as good a lookout as it was possible to do* (369, 371, 372). He, and the mate, heard the horns in this case, noticed the number of blasts, and consulted about the number of blasts (306, 325, 373, 369). The only point in this case, possible to be made by the libellant in this respect, is, should the horn have been heard sooner?—would any other knowledge than that possessed by the lookout, have added to his quickness of hearing? and to such points, does even criticism upon the conduct of the propeller in this case come.

Nor, was there anything calling for more than one lookout in such a case. *No law, no custom requires it. No authority requires it*, under such circumstances. The burden is on the libellant to show that the lookout was not sufficient. "The party suing is bound to establish the negligence of the other party, such as the want of a sufficient lookout" is a note of the reporter in *The City of London*, *Swabey*, 300. In some cases upon the ocean, where icebergs may be met, where vessels of various nationalities may be encountered, where various signal lights and

their changes of bearing, might require watching, and upon large passenger steamers, (the propeller, as has been already stated, was only carrying merchandise)—upon the Europa, for instance, (*The Europa* 2 *Eng. L. & Eq. R.* 557, 562) a large passenger steamer running in a dense fog, *at full speed, and with much less than her usual watch, under such circumstances, on deck*—two lookouts may seem to have formed a part of the watch, and the absence of one might under some circumstances, be regarded as a fault. But such is not this case, in any view. Beside, why are two lookouts ever required? Not to *hear* fog horns. One man, if vigilant, can do that as well as a dozen. Two might be useful in watching for different signal lights on either bow, in watching and understanding them, after they are made. But that is not this case. The signal lights could not be seen on the sail vessel.

Post, Point First, III., 2, *b.*

And, undoubtedly, the fog horn was heard on the propeller as soon as it could be.

Post, Point Second, I.

After it was first heard, there is no claim that it was not rightly heard, nor can it be successfully claimed that there was anything done on the part of the propeller which was wrong.

Post, Point First, III., 3.

After the horn was first heard, there was no necessity for, a lookout; and therefore there was no fault, in any view, in not having one.

The Farragut, 10 *Wallace*, 334.
The Maria Martin, 12 *Wallace*, 31, 42.

It is apparent, therefore, that there was no fault on the part of the propeller as to her lookout. If her lookout was good (and there is no doubt about his vigilance, 371, 372, 304, 306, 373, 369), even if the fog horn was not heard, or if its sound was misunderstood, it was not *fault* on the part of the propeller. It would be one of those things happening through the imperfection of human ability, for which no man is responsible.

What would be said about the lookout of the propeller, were there as much criticisable in that respect, on her part, as on the part of the barque? The barque's lookout did not even hear the propeller's whistle until about five minutes before the collision, although it was heard on board the barque for three-quarters of an hour before.

Post, Point Second, I.

Nor can it be successfully claimed that the presence of any other man on deck in aid of the lookout—to send aloft, for instance—could

have been of any use. He could have seen nothing aloft. The fog was up around the mast of the propeller (350). There were no upper sails on the barque to be seen (4, 45, 137, 161). Of course, she carried no light aloft—no other signal lights than those near the rail in her mizzen rigging (71, 167). When the captain of the barque was aloft, he, on account of the fog, could see nothing of the propeller's colored lights—could see nothing except her masthead light (49, 50), and the propeller's colored signal lights on her arches were at least 15 or 18 feet higher up than the signal lights of the barque (325, 320, 349), and the captain of the barque, said, he was satisfied the signal lights of the barque could not be seen from the propeller (397). Nothing could have been seen or known, then, of the barque, had a dozen men gone aloft.

c. Nor was there any fault in not having another wheelsman. No rule or custom is shown to have required one, and above all, from the moment the two blasts of the horn were heard, and with reference to those two blasts, action was taken on the propeller, there were two men at her wheel. The lookout (for there was nothing for him to do as lookout, and certainly his not standing as lookout any longer, in no degree contributed to the collision) helped put the wheel a-starboard.

Had there been two men at the wheel, it probably will be argued on the part of the libellant, there might have been more celerity in the propeller's movements. The argument is no proper argument, for the only question is, was there fault in not having two in the first place? But suppose there had been two in the first place, it would only have enabled the propeller, acting at first under the indication of the barque's single horn and porting her wheel accordingly, to have made that movement—right under the indication of the horn, but not right as to the actual situation of the vessels—to have made the act of porting more effectual.

Is this case to be decided on such queries as these? Are fortunes to be disposed of under the doctrine of chances, chances which it needs knowledge of the higher mathematics, almost, to appreciate?

d. Nor was there any fault in the fact that the master of the propeller was not on deck.

Certainly the mate, experienced as this one was (299, 300, 331),—the first mate, must be considered competent for the navigation of the vessel under the circumstances. His conduct, under the circumstances, shows it.

Post, Point First, III., 3.

He understood the special meaning of different blasts upon

fog horns on the lake (319, 390), and understood their meaning at the time, (306, 325, 369, 373, 390).*

What was there for any other officer on deck to do? Certainly another officer would not have been required to hear horns. There were no signal lights to be seen. There was no opportunity for deliberation as to whether some other order might not have been given. And certainly it cannot be successfully claimed that anything wrong was done on the propeller after the two blasts of the horn were heard.

Post, Point First, III., 3.
Bissell vs. Mepham, 1 *Woodworth*, 225.

e. What, then, can be the only claim with respect to the watch on the propeller's deck which can be even made on the part of the libellant? Simply that the watch should have been doubled—that there should have been two officers of the deck, two wheelsmen and two lookouts—in short, that both watches—all the men required in the actual navigation of the vessel—should have been on deck in an ordinary fog, on the open lake. It is most confidently contended that there is no authority upon which such claim can be based. If it was within the power of the District or Circuit Court to establish it as the rule, that the watch should be doubled, or, indeed, in the absence of law, rule, or the proof of custom requiring it, to add one man to the watch, why might not either Court have required the watch to be quadrupled? Is not the exercise of such power the virtual abolition of all rule, or *law*, in such matters, and the substitution of the mere opinion, the discretion of courts—of men often comparatively unskilled in maritime affairs—in the place of law? or is it rather the establishment of the rule that any court, in each case, may, on the trial, announce the law or rule to govern it?

It is most confidently contended that no such claim on the part of the libellant can prevail. And it has been already shown, and will yet more fully appear, to what fanciful conjectures, any such claim, with respect to the cause of this collision, only can come.

Post, Point First, V.

---

* Of course, all appearing as to what others may have said about the mate's not understanding horns is not testimony—not even impeaching testimony, for the attention of the witnesses who, it is stated, made such statements, is not even called to them, and the testimony on the part of the libellant in this respect, is of the kind of that in which (153, 254) some of them seem to have anticipated their murder.

And it will be noticed that the testimony, upon the part of the propeller, was taken *before* that of the witnesses who make any statement as to what others *said* about the mate's knowledge of horns (299, 352, 367, 39, 82, 83, 182), and there was therefore no opportunity to contradict these statements. Beside, it of course clearly appears the mate did understand the meaning of different blasts on a horn (319, 390).

3. The conduct of the propeller was entirely proper in every respect.

a. The conduct of the propeller was proper with respect to the other vessels on which other horns were heard, and most certainly was proper with respect to the barque. These other horns were heard on either hand of the propeller, about abeam, apparently about half or three quarters of a mile off (305, 335, 372, 380.) As these horns were heard about abeam, there was no danger from those vessels. This, it is claimed, was not in a thoroughfare of vessels; it was on the broad lake. There was no reason to suppose because these horns were heard other vessels would be heard in that vicinity. Indeed, under the doctrine of chances, there was little chance that there should be. Of course, therefore, the situation of these vessels had nothing to do with the barque, nor, *as to the barque*, could the propeller be required to slacken speed or stop for the reason that these other horns were heard, in any view. No manœuvre could have been required, having reference to any other vessel than the barque, under the circumstances. As a matter of fact, it does not appear that there was any other vessel near the barque.

b. Proceeding, as has been established, at a moderate speed, at a moderate speed not exceeding three miles an hour, and with a competent watch properly placed (and of course as has been already indicated, if the watch was competent, whether the horn of the barque was not heard before, because it was not blown, or not a good horn, or whether it was not heard from atmospheric causes, or whether, when it was heard, there was mistake as to the number of its blasts—and in this respect see *Point Second*, I. —cannot in any degree inculpate the propeller, the single question in this respect being, was the watch competent to *hear a horn?*)—proceeding thus, it is repeated, at a moderate speed, and with a competent watch, suddenly a single blast of a horn was heard—apparently dead ahead, and very near the propeller. As a matter of fact, a single blast of the horn on the lakes signified that the barque was on the port tack (319, 158).

If the propeller was not in fault down to this time, standing as she did in the midst of the peril of the fog, and with a collision probably so imminent, even if she made mistake, under familiar rule it would be no fault, and for such mistake she would not be responsible. Humanity is not supposed to be infallible, even in the officer of the deck of a steam vessel on the western lakes. The same rule, in the absence of fault (for there is no presumption of negligence on the part of the propeller, in this case (*Post*, *Point First VII*, 2) applies here as in a similar emergency to sail vessels.

The Nichols, 7 *Wallace*, 656, 666.

But, it is contended, that the conduct of the propeller beyond

question was right. She heard a single sound of certain significance. She was then *approaching* a vessel with which, under Article 16, there was apparently actual risk of collision. She was already running at moderate speed. She slackened it still more by stopping her engines. There was nothing, then, to indicate that it was "necessary" to stop *and reverse* (see Article 16). Indeed, as the wind was, unless the single sound of the horn freighted the air with a lie (for the barque could not run materially further to the southward), it was a certainty that under her port wheel she would avoid the barque. She could not be in doubt. There was no time for deliberation, and she ported her wheel, and stopped her engines.

There is not one element of *fault* in this. Suppose, in fact, the barque had been on the port tack, and the propeller had not ported, would she not have been held in fault under the circumstances?

Whether or not, if she had not ported, there would have been a collision, is, of course, of no consequence. Doubtless, there would have been, for under her port wheel she scarcely swung any (309, 318, 340). But that is of no consequence. If the propeller had then committed a fault—increased her speed, for instance, she probably would have run across the bows of the barque, and there would have been no collision. But there was not one element of fault in what she did. She acted properly under what she understood to be the circumstances. And free from fault down to that time, for such an act, in such an emergency, she certainly cannot be held responsible.

It is most confidently claimed that no authority can be found establishing fault on the part of the propeller in this respect.*

c. In a very short time, a few seconds (338, 339, 307, 308, 309, 357), two blasts of the horn on board the barque were heard, apparently nearly dead ahead of the propeller, (which were understood and spoken of by mate and lookout, 325, 373, 306, 369, 390), and soon after two more blasts were heard on the propeller, still apparently nearly dead ahead (310, 311, 325, 373). The wheel of the propeller was at once, when the first signal of two blasts was heard, ordered hard a-starboard, and the port engine, which would help the propeller swing to port, was backed (307, 308, 309, 339, 357), and when the second signal of two blasts was heard soon after (310, 311), the wheel of the propeller being still under the order "hard a-starboard," the starboard engine was also backed (310, 311, 357, 358), and the vessels soon after came together. It is believed that the two blasts of the horn, being so certain in their significance as they were, and the danger of collision so imminent as it then was, and as it was understood to be

*The reporter's note 2 in the case of the *Hypodame*, 6 *Wallace*, 216, it is claimed, is not warranted by the opinion in the case at all, and, beside, in that case, the sound heard, had no certain significance, &c.

on both vessels then (or why did the barque make the change of course the District Court finds she did make, just before the collision, and, under its view of the case, finds to have been no fault (434), it will not be attempted, even in this case, to charge any fault, on the part of the propeller, in any of these respects.

d. It is then, most confidently claimed that under any rule, under any article of the Act of Congress with respect to collisions, the propeller was without fault. Even the District Court did not find the propeller in fault in anything with respect to her navigation, after the horn of the barque was heard.

IV. As the propeller was without fault, she cannot be held responsible for the collision, in any measure. If the barque was also without fault, then—as the collision took place when the vessels were surrounded by a fog, one of the great perils of navigation—the collision was the result of "inevitable accident."

1. The technical phrase "inevitable accident" is an unfortunate one, at least, to express what is really intended. In its rigidity of expression, it might be regarded as something absolutely inevitable. It is not that. It, as applied to collision cases, only means a result, happening *where neither party has committed a fault,*

2. A fog is, of course, one of the perils of navigation. In such a case the burden of proof (it need not be claimed that it is so in an ordinary case) is upon the libellant to show that there was fault upon the part of the propeller. Such must be the law upon principle. And such is undoubtedly the law upon authority.

The rule is well stated in

The Marpesia (*E. L. R.*) 4 *Priv. C. App.* 212, 219.

decided since this case was decided in the District Court (*Original Record printed page* 59, *original* 203.

"In consequence of one of the arguments at the bar, it seems "desirable to say something as to the burthen imposed upon a "vessel that seeks to excuse itself for a collision on the ground "of inevitable accident.

"The respondent's counsel suggested that there is some differ- "ence of practice between the Court of Admiralty and the Courts "of Common Law, in that matter. Their lordships, however, "cannot find that there is any such difference. They take the "law as they find it laid down by Dr. Lushington in two cases.

"In the case of the *Bolina* (3 *Notes of Cases*, 210) Dr. Lush- "ington says: 'With regard to inevitable accident, the *onus* lies "'on those who bring a complaint against a vessel, and who seek "'to be indemnified—on them is the *onus* of proving that the

" ' blame does attach upon the vessel proceeded against; the *onus*
" ' of proving inevitable accident does not necessarily attach to
" ' that vessel; it is only necessary when you show a *prima facie*
" ' case of negligence, and want of seamanship.' "

The case of the Virgil, 2 *W. Rob.* 205, is also referred to in this connection.

And see

The Grace Girdler. 7 *Wallace,* 196, 203.
The City of London, Swabey, 300, 302.

3. What then is " inevitable accident?" The language of the courts of last resort, lately employed in cases of leading importance, can best give the definition.

In

The Grace Girdler, 7 *Wallace,* 196, 203.

this court (its opinion having been given by Mr. Justice SWAYNE) most accurately defines inevitable accident.

" Inevitable accident is where a vessel is pursuing a lawful
" avocation in a lawful manner, using the proper precautions
" against danger, and an accident occurs. *The highest degree of*
" *caution that can be used is not required.* It is enough that it is
" *reasonable* under the circumstances—such as is usual in similar
" cases, and has been found by long experience to be sufficient to
" answer the end in view, the safety of life and property."

In the recent case of

The Marpesia, (*E. L. R.*) 4 *Priv. Counc. App.* 212, 220

which arose out of a collision in a dense fog, when vessels could only be seen for a short distance from each other, the Privy Council, in considering the question as to what is inevitable accident, refers to the language of Dr. Lushington in the case of the *Virgil* (2 *W. Rob.* 205) giving an often quoted definition of inevitable accident, in which the illustration is employed of a vessel going eight or nine miles an hour, when she ought only to have proceeded at the rate of three or four, in its opinion uses this language: "*Here we have to satisfy ourselves that some-*
" *thing was done or omitted to be done which a person exercising*
" *ordinary care, caution and maritime skill in the circumstances*
" *either would not have done or would not have left undone as the*
" *case may be.* Their Lordships * * * have *failed to come to*
" *the conclusion that the captain was to blame for having omitted*
" *to do that which the judgment seems to find he might have done*
" * * * . Their Lordships having for these reasons come to
" the conclusion that the collision in this case was one of those
" unfortunate accidents in navigation which *no ordinary care,*

"*caution or maritme skill could have prevented*, are compelled "to dissent from the finding of the learned Judge of the Admir- "alty, that the Marpesia was solely to blame," and the case was held to be one of inevitable accident.

And see

The Morning Light, 2 *Wallace*, 550, 560,

referring to a definition of "inevitable accident" as given by Dr. Lushington, and adding substantially, "that *a collision resulting* "*from the darkness of the night, and without the fault of either* "*party, is properly to be regarded as an inevitable accident.*"

What then is "inevitable accident" in a collision case, legally? It is a collision happening *without maritime fault on the part of either party*—happening in this case, if there was no fault on the part of the barque, as there was none on the part of the propeller —happening from the fog—the fog, the proximate cause of the collision, and without which there would have been no collision, as in the case of the *Morning Light* the collision happened from the darkness.

The Morning Light, 2 *Wallace*, 550, 560, 561.
Steinbach vs. Rae, 14 *Howard*, 532, 533, 538.
The Ship James Gray, 2 *Howard*, 184, 194.
The Fashion, *Newberry*, 8.
1 *Parsons on Ad.*, 525.

V. But, if there be doubt whether the propeller was in fault: or, *doubt whether such fault, if it existed, caused the collision*, the propeller cannot be made, in any measure, responsible for the collision.

1. That this is so, must be apparent from the fact, that, in such a case, the burden of proof is upon the party, seeking to establish fault upon the part of the propeller, to establish it.

Ante, *Point First*, IV., 2.

2. Such is the rule upon express authority.
"Where there is reasonable doubt" say this Court in

The Grace Girdler, 7 *Wallace*, 196, 203,

"as to which party is to blame, the loss must be sustained by the "party on whom it has fallen."
In

The City of London, *Swabey*, 300, 301,

the Privy Council in pronouncing its opinion says: "The par- "ty seeking to recover compensation for damage, must make "out that the party against whom he complains was in the "wrong. The burden of proof is clearly upon him, and he must

"show that the loss is to be attributed to the negligence of the "opposite party. *If, at the end, he leaves the case on even scales "and does not satisfy the court that it was occasioned by the neg- "ligence or default of the other party, he cannot succeed.* Now "on the present occasion, their Lordships are of opinion, that he "has not satisfied the conscience of the Court that the cause of "the loss was the misconduct of the steamer. He has, at all "events, *left the matter in doubt* so that it is impossible in the "most favorable point of view to decide whether the collision "was occasioned by the misconduct of the steamer or by the de- "fault of the smack herself, &c."

In the case of

The William Lindsay, (*E. L. R.*) 5. *Priv. Council App.* 338, 343,

this is the language employed:

"The master is bound to take all reasonable precaution to "prevent his ship doing damage to others. It would be going "too far to hold his owners responsible because he may have "omitted some possible precaution which the event suggests he "might have resorted to. The true rule is that he must take all "such precautions as a man of ordinary prudence and skill, ex- "ercising reasonable foresight would use to avert danger in the "circumstances in which he may happen to be placed."

In

The George, 9 *Jurist*, 670, 672,

the Court employs this language:

"In order to render the owners responsible for the damage "done, I must be able to come to a *clear conviction that there "was actual neglect or want of care* on the part of the master or "crew, *and if the evidence should be nearly balanced, I cannot "pronounce affirmatively, so as to saddle them with the consequen- "ces of the collision.*"

And see

The Catharine of Dover, 2 *Hagg*, 145, 154.

And can there be, at most, more than a doubt in this case, looking at it most favorably for the libellant? Reducing all that may be said on the part of the libellant, to its substance, and what is it at most? Two or three queries based on criticism closer than are ever applied to human affairs, unless it may be to acts of the finest skill—an operation in surgery, for instance, based on no violated law or rule, on no evidence of custom, on no opinions of experts, to show fault, and requiring the higher mathematics almost, to calculate the chances of this collision having been caused by anything even hypercriticism can cavil about.

Was the propeller's speed, not exceeding three miles an hour, greater than such as ordinary skill and prudence would have permitted under the circumstances? And if ordinary skill and prudence would not have permitted such speed—the speed of a man's slow walk—how many rods an hour slower would have exactly squared with ordinary skill and prudence, and with the requirements of the statute, that the propeller should go at a moderate speed?

Would another lookout, would three pairs of ears, have heard the fog-horn of the bark *sooner* (for it is to be remembered that it is claimed, that no rule, authority or proof shows that more than one lookout was required (*ante*, *Point First*, III, 2 *b.*), and, therefore, the burden is not on the propeller to show that the absence of another lookout did not contribute to the collision), and if so, how much sooner than two pairs? And if two pairs would have heard the horn sooner, would they have heard it enough sooner to have prevented the collision? These (for they are really the only points in the case for even cavil) are the queries, upon the speculative answers to which (for there is no proof that the speed was too great, and, practically, it is claimed it was no more than enough for proper steerage way under the circumstances, and no proof that the watch was defective) are to depend the disposition of what was once, at least, a fortune.

If the property of men is to be drawn from them by such slight threads, who can assure himself of a single possession? In any other than a collision case (and, of course, the rules are the same in all cases sounding in negligence), would any man expect to take property from his neighbor upon such grounds? What chance, in an ordinary case of alleged negligence, would a man stand on such evidence, of getting a verdict against another, before a jury?

SECOND.

If this collision took place, or the loss of the bark happened, without the fault of the propeller (and we have seen that it did), and if it was not attributable to "inevitable accident;" it took place by the fault of the bark, and the propeller is not in any measure responsible.

I. Was the barque's fog-horn properly sounded, and was it a proper fog-horn? There is that general evidence scarcely ever wanting on the part of a sail-vessel, that the fog-horn was sounded, as there is scarcely ever evidence wanting on the part of a sail-vessel, when it is thought to be the thing to be proven, that a

sail-vessel did not change her course. And if the barque did sound her fog-horn, did she so sound it as not to mislead the propeller?

1. The whistle of the propeller was heard on the barque about three-quarters of an hour, by the clock, before the collision, by the captain of the barque, and when he estimates vessels were four or five miles apart (68, 69, 73, 63).

By the lookout, who blew the horn, and by Nolan, who was with him forward, nothing was known of the approach of the propeller until about five minutes before the collision (219, 243, 263, 268). As to blowing the horn, the man who blew it says he had been blowing the fog-horn at intervals, and he states that after he heard the propeller's whistle, he blew it faster, &c. (263). But, it is repeated, *he (and he was the lookout) and Nolan knew nothing of the approach of the propeller until she was close to them* (219, 243, 263, 268), and yet the master had heard the propeller's whistle, and knew she was approaching, three-quarters of an hour by the clock (68, 69, 73, 63). Why did not the lookout, who blew the horn, and Nolan, know these things as well? Certainly they would if they had been attentive to their duty.

This is not the ordinary matter of a slight discrepancy in an estimate of time. The master of the barque knew of the presence and approach of the propeller (and, of course, the libellant cannot question this) three-quarters of an hour, by the clock, and the lookout, who blew the horn, and Nolan (and their evidence as to what they did shows that this was true), only knew of the approach of the propeller for five minutes. Of course, there is general testimony that the horn had been blown for some time. Perhaps it had some time before. But what were the lookout, who blew the horn, and Nolan doing for the forty minutes, or more, before they heard the propeller's whistle? (and how accurately it corresponds with the supposition, that for some time before the man who blew the horn first heard the propeller's whistle, the fog-horn had not been blown, that, when the whistle was heard by this man, *an order was given to him as to blowing the fog-horn* (263, 73)? Are we to take such evidence as is given on the part of the barque, as *proof to establish the fact incumbent on the bark to establish, that the horn was properly blown, and in signals of two blasts all the time?*

What would be claimed as to the propeller's lookout, had he been thus inattentive? Certainly that the fog-horn should be properly blown, and that she should have a proper fog-horn, were the first duties of a sail-vessel under such circumstances. The sole proof as to the quality of the fog-horn has already been referred to (263–264), and certainly it can be well claimed, that on such proof, the barque has not shown that she had a horn, proper in the considerable wind of that night.

II. Upon the contrary, what is the proof on the part of the propeller? (and such proof is affirmative proof. *The Schooner Sam Weller*, 5 *Benedict*, 293, 295). Two most competent men, whose business it was to listen, who stood in proper places to hear, and did listen (304, 305, 371, 372), did not hear this horn blown until the vessels were close to each other (304, 305, 371, 372), and who say that when it was first heard, it was a signal of one blast. They estimate the time they heard the horn before the collision as about two or three minutes (305, 372). The lookout, who blew the horn on the barque, and Nolan estimate the time they heard the whistle of the propeller before the collision at about five minutes. Estimates of time in collision cases are proverbially incorrect (but no one could claim that it was a mere mistake in estimate, where one group of witnesses estimate a period of time at five minutes, and another witness swears it was three-quarters of an hour, by the clock), and these estimates of two minutes and five minutes may well be of the same time. What, then, would be the inference from all this? That the lookout, who blew the horn on the barque, and Nolan, were absent or inattentive to duty until a very short time before the collision (and, perhaps, that there was so much going on as to the barque's sails, as there was, down to half-past eleven o'clock (161, 67), accounts for this), that they did not hear the propeller's whistle until the vessels were close together, and that for some time before then (whatever was done a long time before) the horn of the barque was not blown, and that as soon as the fog-whistle was heard by the man who blew the horn, he answered it with the horn, as he says he did (263), or that the fog-horn was not a proper one.

If the barque has not shown that she properly sounded her fog horn, or has not shown that the horn was a proper one, she, it is claimed, is responsible for this collision. Is this large amount of money to be disposed of on such proof as this; that she had a good fog horn and properly sounded it?

It is, therefore, claimed that the barque did not properly sound her fog horn, or if she did, that her horn was not a proper one.

III. If there was any fault upon the part of either vessel on account of excessive speed, the fault was on the part of the barque. Her speed was greater than that of the propeller, and the same principles, it is claimed, apply to both vessels.

Lowndes on Collision, 73.

IV. The barque was in fault in not avoiding the collision.

Let us re-state the facts as detailed by the leading witnesses upon the part of the libellant. The fog—a peril of navigation—was dense. The whistle of the propeller was heard off the barque's starboard bow. For three quarters of an hour the

propeller was heard to approach to windward, when the sound of a fog-horn might not be heard on her—to approach steadily. The barque, the libel states, was close hauled on the starboard tack (5). She could have easily starboarded her helm and kept away. She, of course, could and should have assumed that the propeller was complying with her statutory duty, and going at a moderate speed.

The Wenona, 8 *Blatchford*, 499, 508.

The barque herself was going at a speed of about four or five miles an hour (45, 47, 186,) when nearly close hauled. If she had star-boarded her helm and kept away she would have increased her speed—she would have run at least two miles to the propeller's one. But she did not. The libel alleges, and her officers swear, she kept her course until the instant of collision (8, 51, 75, 139). Had she so changed her course, had she changed it even when her captain was in her cross trees, and saw the propeller's mast head light, and of course knew exactly where she was (49, 50), she would have run away from the propeller—there would have been no chance of danger, there would have been no collision. Under the circumstances, it is most confidently claimed the barque was in fault in thus rushing into certain danger, when she could have avoided it without risk.

The Grey Eagle, 9 *Wallace*, 505.
The Maria Martin, 12 *Wallace*, 31.
Post, Point Second, IV., 2.

It is presumed it will be argued on the part of the libellant that this was an extraordinary case, requiring extraordinary action on the part of the propeller. If this be true, equally was exceptional action required on the part of the barque. Certainly she should not have rushed into danger as she did.

That a change of course on the part of the barque, under such circumstances, was required, is apparent from accurate consideration of Article 18. Article 18 only prescribes one thing—that under certain circumstances a vessel shall "keep her course," "*subject* (it immediately continues—the change of course to be kept, *subject*) to the qualifications in the following *article*;" and then follows Article 19, requiring special regard to dangers of navigation, and a departure from preceding rules, &c., and to this follows Article 20, requiring *precautions*, under special circumstances.

Change of course on the part of a vessel otherwise required to keep it, is, then, in a danger of navigation, under Articles 18 and 19, the thing *absolutely required*, when it would tend towards safety. And if Articles 18 and 19 do not apply to this case, to what case would they apply? And can it be said that it was not, in this case, at least a *precaution*, under the circumstances required by Article 20? How can these questions be

answered except by condemnation of the barque, when it is absolutely indisputable, that not only under the indications then appearing, but as a matter of fact, if the barque had changed her course and kept away, a collision would have been impossible? And there was not one thing to prevent her from doing it.

2. The barque was in fault in this respect upon authority.

Peck vs. Sanderson, 17 *Howard*, 178, 182.

The rule contended for, and in this respect it has not been changed by the act of Congress of 1864, with respect to avoiding collisions, is well stated in this case. The collision happened in a starlight night, but, as is stated by the reporter, there "was a haze upon the water which prevented the schooner from "being seen until she came within a distance of two or three hundred yards."

The Court says (Chief Justice TANEY delivering the opinion):

"It is without doubt the general rule that a sailing vessel should "keep her course when approaching a steamboat, and it is the duty "of the latter to keep out of the way. *But this rule presupposes that* "*the steamer discovered, or ought to have discovered, the sailing ves-*"*sel when at a sufficient distance to avoid her by changing her own* "*course. But where, as in the present case, they were brought sud-*"*denly and unexpectedly close to each other, and the ordinary rules* "*of navigation will not prevent a collision, it is the duty of each* "*to act according to the emergency, and to take any measure that* "*will be most likely to attain the object.*"

And see

The Sapphire, 11 *Wallace*, 164, 171.
The Mary Eveline, 16 *Wallace*, 348.
The Hope, 1 *W. Rob.* 154, 156.
The Commerce, 3 *W. Rob.* 287.
The Cornelius C. Vanderbilt, *Abbott, Ad. R.* 361, 364)

V. The crew of the bark were in fault in abandoning the bark. The vessels were near each other about an hour (359, 323, 372. Had the crew of the bark not abandoned her so soon, and had they made proper efforts to save her (55, 56, 87, 222, 223, 248, 265, 285, 320, 398), it may well be she would not have been lost. The libellant has not shown that she would have been lost had not the crew been so in fault, and unless this is shown, the propeller cannot, it is claimed, be made liable for the loss.

THIRD.

By the decisions of the District and Circuit Courts, the value of the barque was fixed at too great an amount (*Original Record*,

printed page 78, *original* 255–256). The value should have been found at a much less amount, having reference to the cost of building a new vessel (*Original Record, printed pages* 73–77, *original* 237, 252.)

FOURTH.

The decrees of the Circuit and District Courts should be reversed, and the libel in the case dismissed, with costs.

GEORGE B. HIBBARD,
Counsel for the Appellants,
Buffalo, N. Y.